INDEX TO APPENDIX

PAGE

OPINION OF THE SPECIAL STATUTORY COURT, AS REPORTED IN 26 F. (2d) 912 1

Decree of the Special Statutory Court allowing interlocutory injunction 41

PROVISION OF CONSTITUTION OF THE STATE OF NEW YORK AS TO CONSENTS FOR CONSTRUCTION OR OPERATION OF STREET RAILROADS 53

Article III:

§ 18—Restrictions on laws governing street railroads 53

PUBLIC SERVICE COMMISSIONS LAW OF THE STATE OF NEW YORK—LAWS OF 1907, CHAPTER 429—PERTINENT SECTIONS SHOWN AS OF MARCH 19, 1913, THE TIME OF MAKING CONTRACT NO. 3 (EXCEPT AS OTHERWISE INDICATED), TOGETHER WITH NOTES SHOWING, WHERE MATERIAL, THE AMENDMENTS, IF ANY, BEFORE AND AFTER THAT DATE 54

Article 1—Public Service Commissions; General Provisions 54

§ 2—Definitions 54

5—Street railroad 54

6—Railroad 54

7—Street railroad corporation 55

8—Railroad corporation 55

9—Common carrier 55

J60026

PAGE

§ 3—Public service districts 56
§ 4—Public service commissions established; appointment; removal; terms of office 56
§ 4-a (Added in 1921)—Transit commission; established; appointment; term; removal 56
§ 5—Jurisdiction of commissions 57
§ 5-a (Added in 1921)—Jurisdiction of transit commission 57
§ 22—Rehearing before commission 58
Article 2—Provisions Relating to Railroads, Street Railroads and Common Carriers 59
§ 25—Application of article 59
§ 26—Safe and adequate service; just and reasonable charges 59
§ 28—Tariff schedules; publication 60
§ 29—Changes in schedule; notice required 62
§ 33—Transportation prohibited until publication of schedules; rates as fixed to be charged; passes prohibited 64
Article 3—Provisions Relating to the Powers of the Commissions in Respect to Common Carriers, Railroads and Street Railroads .. 65
§ 49 (1)—Rates and service to be fixed by the commission 65
Amendments of 1910 66
Amendments of 1921, 1922 and 1923 66
§ 49 (2) 69
§ 49 (4) 69
Second, third and fourth paragraphs (Added in 1922) 70

PAGE

§ 49 (8) 71

§50—Power of commissions to order repairs or changes..... 71

§ 51—Power of commissions to order changes in time schedules; running of additional cars and trains..... 72

§ 55—Approval of issues of stock, bonds and other forms of indebtedness..... 73

§ 56—Forfeitures; penalties..... 75

§ 57—Summary proceedings..... 75

Article 4—Provisions Relating to Gas and Electrical Corporations; Regulation of Price of Gas and Electricity..... 77

§ 66 (12)—General powers of commission in respect to gas and electricity.. 77

Article 4-a (Added in 1913)—Provisions Relating to Steam Corporations; Regulating Price of Steam..... 81

§ 80 (10)—General powers of commission in respect to steam heating..... 81

Article 7—Commissions and Offices Abolished; Saving Clause; Repeal..... 84

§ 127 84

Article VIII (Added in 1924)—Board of Transportation 86

§ 135—Municipal operation; rates of fare 86

PAGE

RAPID TRANSIT ACT OF THE STATE OF NEW YORK —LAWS OF 1891, CHAPTER 4—"AN ACT TO PROVIDE FOR RAPID TRANSIT RAILWAYS IN CITIES OF OVER ONE MILLION INHABITANTS"—PERTINENT SECTIONS SHOWN ARE AS OF MARCH 19, 1913, THE TIME OF MAKING CONTRACT NO. 3 (EXCEPT AS OTHERWISE INDICATED), TOGETHER WITH NOTES SHOWING, WHERE MATERIAL, ORIGINAL ENACTMENT OF SECTION AND AMENDMENTS, IF ANY, UP TO MARCH 19, 1913 87

Section 4—Public Service Commission to Determine Necessity for Railroads; Routes; Plan; Consents; Parks and Streets excepted 87

Subd. 1 87

Section 5—Approval and Consent of Board of Estimate and Apportionment, or other Board, Consent of Local Authorities 89

Subd. 1 89

" 2 90

" 5 90

Section 6—Detailed plans; tunnel for pipes and wires; work affecting sewers and other sub-surface structures 91

Subd. 1 91

" 2 92

Section 7 (Repealed in 1909)—Sale of franchises at public auction, etc.; five-cent fare provision 93

Section 22—Private construction; franchise to construct, maintain and operate 93

PAGE

Subd. 1 93
" 6 94
Section 24—Connections with other railroads, stations and ferries (showing changes accomplished by the 1912 amendments) 95
Subd. 1 95
" 2 100
" 3 100
" 4 102
" 5 103
" 6 104
Section 27—Contract for equipment, maintenance and operation (showing changes accomplished by the 1912 amendments) 105
Subd. 1 105
Paragraph (1) 106
" (2) 107
Subd. 2 109
" 3 113
" 4 115
" 5 118
" 6 119
" 7 120
" 8 120
" 9 121
" 10 122
Section 30—Plans for maintenance and operation of road by public service commission .. 123
Subd. 1 123
Section 38—Modification of contracts 124
Section 63 (Renumbered 58 in 1915)—Proviso in case road constructed by City 125

PAGE

RAILROAD LAW OF THE STATE OF NEW YORK—PERTINENT SECTIONS ARE REPRINTED IN THE FORM IN WHICH THEY WERE IN 1907, WITH NEW NUMBERS SHOWN IN PARENTHESES AS IN THE CONSOLIDATED LAWS, CHAPTER 481, LAWS OF 1910 126

(§ 57) § 37—Rates of fare 126

(§ 173) § 93—Conditions upon which consent shall be given; sale of franchise at public auction 128

(§ 181) § 101—Rate of fare 130

(§ 229) § 129—Powers 132

Subd. 1 132

TRANSPORTATION CORPORATIONS LAW OF THE STATE OF NEW YORK—PERTINENT SECTIONS REPRINTED IN THE FORM IN WHICH THEY WERE IN 1907, WITH NEW NUMBERS IN PARENTHESES SHOWN AS IN THE REVISED LAW OF 1926 133

(§ 11) § 61—Powers 133

(§ 86) § 45 134

GREATER NEW YORK CHARTER—CHAPTER 466, LAWS OF 1901—PROVISIONS REGULATING TERMS AND CONDITIONS FOR FRANCHISE GRANTS 135

§ 73 135

§ 74 137

STATUTORY PROVISION FOR FARE OF FIVE CENTS APPLICABLE TO ELEVATED RAILROADS 140

Chapter 743, Laws 1894 140

CONTRACT NO. 1—PROVISIONS AS TO FARES 142

CONTRACT NO. 2—PROVISIONS AS TO FARES 143

CONTRACT NO. 3—PERTINENT PARTS 144

PAGE

Opening Paragraph, showing the Parties.... 144

From the Recitals:

Intent—Unified Operation for a Single Fare 144

From Chapter I of Part First ("General Provisions"), entitled "Outline of Contract and Definitions":

Article I. Agreement—Unified Operation for a Single Fare. Modification of Contracts Nos. 1 & 2 145

Article II. Definitions—Existing Railroads—Existing Equipment 146

From Chapter VII of Part First, entitled "Miscellaneous":

Article XXXV. Intent—Existing Provisions of Law in Contract 146

Article XXXVI. If any provision held to be illegal, not to affect balance of contract 147

From Chapter I of Part Third ("The Lease"), entitled "Length of Term, etc.":

Article XLVII. The lease is for operation for a single fare 147

Article XLVIII. Modifications of Contracts Nos. 1 & 2—Terms synchronized 147

From Chapter II of Part Third, entitled "Rental":

Article XLIX. Determination of Rental 148

Deductions from Revenue 149

1. (a) The City's first preferential 149

b. The Company preferential. 154

PAGE

10. The City's second preferential 156

Article L. The City and Company are to share equally in remaining profits 158

Article LI. The deficits to the City or to the Company shall be cumulative with compound interest 158

From Chapter III of Part Third, entitled "Character of Service, Rate of Fare, etc.":

Article LIX. Through operation and free transfers at connecting points for a single fare 158

Article LXII. Five-cent fare 159

Article LXIX. Reservation of trackage rights 159

From Chapter IV of Part Third, entitled "Additions and Changes":

Article LXX. Enumeration of City's objects in making contract 160

ELEVATED EXTENSION CERTIFICATE—PERTINENT PARTS 161

Opening Paragraphs, showing the Parties, etc. 161

From the grant, specifying the term 162

From Article VI, as to rate of fare:

Five-cent rate on elevated lines and on jointly operated lines 162

From Article IX, as to provision of trackage rights and through service 163

From Article X, as to intention of the parties; City's interest in profits 163

PAGE

From Article XII, as to compensation payable to The City of New York:
Deductions from revenue—City's share to be one-half of the profits 164
From Article VIII as to interrelation of Certificate and Contract No. 3 171

OPINIONS OF THE NEW YORK COURT OF APPEALS:
Matter of Quinby v. Public Service Commission, 223 N. Y. 244 173
People *ex rel.* Village of South Glens Falls v. Public Service Commission, 225 N. Y. 216 ... 188
People *ex rel.* City of New York v. Nixon, 229 N. Y. 356 211
People *ex rel.* Garrison v. Nixon, 229 N. Y. 575 .. 218
People *ex rel.* Garrison v. Nixon (on reargument), 229 N. Y. 645 235
Town of North Hempstead v. Public Service Corporation of Long Island, 231 N. Y. 447 238

SUMMARY OF TYPICAL CASES OF COMMISSION ASSERTION AND EXERCISE OF REGULATORY POWERS, OVER APPELLEE, UNDER PUBLIC SERVICE COMMISSION LAW 242

TABLES SHOWING RATE BASES, ACCORDING TO VARIOUS CONTENTIONS OF THE PARTIES HERETO, AND RETURN THEREON 251

1. The present value of all the property devoted to the public service 251
A. Computation based on Company's figures for Company-provided property and on figures of Commission's

PAGE

engineers for City-provided property 251

B. Computation based on Transit Commission's engineers' reproduction cost figures 252

C. Computation based on Transit Commission's engineers' reproduction cost figures with straight line depreciation 253

D. Computation based on the City's specific deductions (brief, pp. 162-168) 254

2. The cost of all the property 256

A. Computation based on Companies' investment and Transit Commission's engineers' original cost figures for City property 256

B. Computation based on Transit Commission's engineers' original cost figures 258

C. Computation based on the City's specific deductions (brief, pp. 162-168) from the Commission's engineers' figures 259

3. The present value of the Company-provided property 260

A. Computation based on Company's figures 260

B. Computation contrasting the figures of the engineers of the Transit Commission with the Company's figures . 261

PAGE

4. The present value of the Company-owned property. 263
   A. Computation based on the Company's figures 263
   B. Computation based upon the figures given in the Commission's brief (page 197) and the City's brief (page 166) contrasted with the Company's figures in the preceding table, 4-A 264
5. The Company's original investment 265
   A. Computation based on Companies' investment on the Company's figures 265
   B. Computation based upon the Transit Commission's figures (see Commission's Brief, page 191) 266

Revenues, Expenses and Application of Income for Year ended June 30, 1926 267

Revenues, Expenses and Application of Income for Year ended June 30, 1927 268

Opinion of the Special Statutory Court.

[As reported in 26 F. (2d) 912; also, R. 1968-1995.]

INTERBOROUGH RAPID TRANSIT CO. v. GILCHRIST et al.

District Court, S. D. New York, May 2, 1928.
Decree May 10, 1928.

[*913] In Equity. Suit by the Interborough Rapid Transit Company against J. F. Gilchrist and others, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, and others. On motion for an injunction pendente lite. Injunction granted.

See, also, 25 F. (2d) 164.

James L. Quackenbush, of New York City (William L. Ransom and Jacob H. Goetz, both of New York City, and Harry L. Butler, of Madison, Wis., of counsel), for plaintiff.

George P. Nicholson, Corp. Counsel, of New York City (Charles L. Craig, Joseph A. Devery, Edgar J. Kohler, and M. Maldwin Fertig, all of New York City, of counsel), for defendant city of New York.

Clarence M. Lewis, of New York City (Samuel Untermyer, Irwin Untermyer, Robert S. Johnstone, C. D. Williams, and G. H. Stover, all of New York City, of counsel), for defendant Transit Commission.

* In this and the succeeding opinions, the figures in [ ] are the numbers of the pages of the official reports.

Opinion of the Special Statutory Court.

Murray, Aldrich & Roberts, of New York City (William Roberts, of New York City, of counsel), for defendant Manhattan Ry. Co.

Before MANTON, Circuit Judge, and KNOX and BONDY, District Judges.

MANTON, Circuit Judge. The original bill in this suit was filed in the forenoon of February 14, 1928. It seeks to restrain the members of the transit commission of the metropolitan division of the department of public service of the state of New York, from enforcing various rate limitations, restricting the rate of fare charged by the plaintiff on its rapid transit railways, operated in the city of New York, to 5 cents per passenger, upon the theory that such limitations have become confiscatory under the Fourteenth Amendment to the federal Constitution. It asks that they be restrained from interfering with the plaintiff, which proposes to charge 7 cents for passenger, or such other fare in excess of 5 cents as is not confiscatory. The court is asked to restrain the transit commission from carrying out threats to do various things which deny to the plaintiff its day in court, [*914] for an adjudication of its rights as to rates, and from attempting to obstruct and defeat steps taken by the plaintiff from time to time, which it claims it is authorized to do under the statutes, to obtain relief from the alleged confiscatory 5-cent fare.

After this suit thus commenced, and on the same day, the transit commission and the city of New York, in three suits in the New York state courts, asked for injunctive relief in substance requiring the plaintiff to

charge but 5 cents for each passenger and to restrain it from carrying out its proposed increase of fare per passenger. On February 17, 1928, the plaintiff filed an ancillary complaint in this court, praying that the defendants be enjoined and restrained from further prosecuting or causing prosecution of their respective suits in the state court, and restraining them from in any wise interfering with the prosecution of the original action in this court. A judge of the District Court granted an order (25 F. [2d] 164) which enjoined and restrained the defendants from further prosecuting the suits in the Supreme Court of the state. An application was made and granted for convening a court of three judges, pursuant to section 380 of the United States Code (28 USCA § 380).

A public service corporation which is being actually subjected to a confiscatory limitation of its rates, whether that be imposed by an order of a regulatory state body or an act of the Legislature, even though there be pending in the state court proceedings for the revision of the order, may seek injunctive relief from a federal court, when it appears that it is suffering daily from confiscation under the rate to which it is limited, and particularly where it appears that it has done all it could under the state law to obtain relief without success. Springfield Gas & El. Co. v. Barker (D. C.), 231 F. 331, 335; Love v. A. T. & S. F. R. R. Co. (C. C. A.), 185 F. 321, 324. Rules of comity or convenience must give way to constitutional rights, and there is no doubt of the duty of a District Court to take and retain jurisdiction. Oklahoma Gas Co. v. Russell, 261 U. S. 290, 293, 43 S. Ct. 353, 67 L. Ed. 659; Monroe Gaslight Co. v. Michigan Public Utilities Co. (D. C.), 292 F. 139.

The suit is here upon causes of action stated in the complaint and supported by affidavits, to which answers are filed with accompanying affidavits in opposition. It is alleged generally that the transit commission and the city of New York are enforcing various rate limitations imposed by the Legislature, and by acts legislative in character, of the state of New York, restricting the rate of fare charged by the plaintiff on each of the elevated lines and the subway divisions of the rapid transit railways operated by the plaintiff within the city to 5 cents per passenger, in breach of the Fourteenth Amendment of the Constitution, because such limitations have become confiscatory.

Relief is sought (a) from limitation imposed by legislative acts of the state of New York (chapter 743 of the laws of 1894) upon rates chargeable on the elevated railroad lines operated by the plaintiff, which are in large part owned by the Manhattan Railway Company, and are now operated under lease by the plaintiff; (b) from the rate provision in a certain elevated railroad extension certificate of March 19, 1913, granted by the Public Service Commission for the First District, acting in behalf of the city of New York, to the plaintiff, and to permit the plaintiff, in conformity with and in pursuance of the Public Service Commission Law and the powers conferred and delegated to it by the Legislature, including the plaintiff's tariff schedules, to establish an increase in fare chargeable by the plaintiff on the elevated lines and to secure a determination by the regulatory authority of the state; (c) as to limitations imposed by the Legislature, or acts legislative in character, of the state of New York, including the plaintiff's tariff

schedules on the rates chargeable on the subways of the rapid transit railroads operated by the plaintiff, which it owns in part and which are in part owned by the city, and also the rate provision in contract No. 3, herein referred to, made March 19, 1913, between the plaintiff and the Public Service Commission of the state of New York for the First District, acting in behalf of the city for rapid transit railroad extensions within the city, in accordance with the steps taken by the plaintiff in conformity with and pursuant to the provisions of the Public Service Commission Law and the power and authority conferred upon and delegated to it by the Legislature to establish an increase in fare chargeable on the subway divisions and to secure a determination by this regulatory authority of the state.

Relief is sought, not only as to fare chargeable on the elevated and subway divisions of the rapid transit railways operated by the plaintiff, considered as separate unified systems under the legislation and acts legislative in character, but also upon all the rapid transit railways considered as a unified operation under the legislation and acts legislative in character and under the elevated [*915] extension certificate and contract No. 3 for rapid transit railroad extensions of March 19, 1913.

The ancillary bill filed makes clear the denial, by the commission, of a hearing as asked when schedules were filed on February 1, 1928, and moreover that the defendants actively sought the aid of the state court in enjoining the plaintiff from proceeding to enforce its rates as provided in the schedules. It further appears in the original bill that two previous applications to the com-

mission and its predecessors, asking for an increase in rate had met with denial, because the commission considered itself without jurisdiction or power to grant such relief. From this it is manifest that the commission intended never to accord the plaintiff a hearing on its application, whatever its merits might be. Denial of an application for a hearing, where the statute provides for such application, amounts to confiscation, if the rate be too low. Prendergast v. N. Y. Tel. Co., 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853.

The Rapid Transit Act, chapter 4, of the Laws of 1891 of the state of New York, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," provided for the appointment of rapid transit commissioners in such cities, and that "they shall have and exercise the specific authority and powers hereinafter conferred, and also such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon the said board by this act." Section 4 provided for the determination of the necessity of railways, the fixing of routes, and the approval and consent of the common council, and section 6 provided that, when the consent of the local authorities and property owners had been obtained, the board was required to prepare detailed plans and specifications, including equipment and safety devices. Section 7 provided for the sale of the right, privilege, and franchise to construct, maintain and operate the railways, and the terms of sale "must also specify the amount of the capital of any such corporation, and number of shares of capital stock, * * * and the maximum rates of fare and freight which such corporation may charge and collect for the carriage of persons and property."

This act was amended by chapter 729 of the Laws of 1896, section 34, as added by c. 752 of the Laws of 1894, § 9, and amended by section 10, c. 519 of the Laws of 1895, so as to provide that, in case the people should determine that any railway shall be constructed for or at the expense of the city, the board shall consider routes and plans previously adopted and proceed therewith, and that any contract for the construction of said route shall provide that the person or corporation so contracting shall, at his own cost and expense, equip, maintain, and operate the said routes or roads for a term of years, to be specified in the contract, for not less than 35 or more than 50 years, and upon "such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interest, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board."

By chapter 472 of the Laws of 1906, the board of rapid transit commissioners was reconstituted, so as to consist of the mayor, the comptroller, president of the Chamber of Commerce of the state of New York, and five persons named in the act, with vacancies to be filled by the mayor. The board so constituted had specific powers and duties therein provided for the "efficient performance of the duties imposed upon the said board by this act." By chapter 429 of the Laws of 1907 there was substituted for the act creating the rapid transit railroad commissioners the Public Service Commission of five members of the First District to be appointed by the Governor. By section 5, subd. 6, of that act, the

commissioners of the First district were given all powers theretofore conferred upon the board of rapid transit railroad commissioners under chapter 4 of the Laws of 1891, and the board of rapid transit railroad commissioners was abolished by section 83.

By chapters 343 and 350 of the Laws of 1926 (sections 431-433) the present transit commission was provided for, and the duties of the Public Service Commission and transit commission were transferred to it. By chapter 498 of the Laws of 1909 and chapter 504 of the Laws of 1910 various amendments were made to the Rapid Transit Act which are unimportant here.

Section 49 of the Public Service Commission Law (chapter 429 of the Laws of 1907) provides that, "whenever either commission shall be of opinion * * * that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons, or property within the state, or that the regulations or practices of such * * * street railroad corporation affecting such rates are unjust, unreasonable, [*916] unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier * * * or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall * * * determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service

to be performed, * * * and shall fix the same by order to be served upon all common carriers * * * or street railroad corporations by whom such rates, fares and charges are thereafter to be observed." This may be done by complaint or upon the commission's own motion. By the same provision, the carrier is obliged to comply with and observe orders made by the commission as to rates of fare.

Plaintiff's subway division consists of lines which were constructed under contract No. 1, dated February 21, 1900, contract No. 2, dated July 21, 1902, and contract No. 3, dated March 19, 1913. Contracts No. 1 and No. 2 were made prior to the act creating the Public Service Commission and the effective regulatory power granted under section 49 thereof. Contract No. 1 was made by the board of rapid transit commissioners, on behalf of the city of New York, with John B. McDonald for the construction by him, at the expense of the city, and for lease to him for operation for a term of years, of a subway known as the Manhattan-Bronx Rapid Transit Railroad through the east side of Manhattan Island to the Bronx. He agreed to equip, maintain, and operate the same. During the term, such equipment was to be supplied as his property subject to the city's right of repurchase at the end of the term. That contract from time to time was modified and supplemented.

Contract No. 2 was made by the board of rapid transit commissioners on behalf of the city of New York, with the consent and approval of the board of estimate and apportionment of the city of New York, with the Rapid

Transit Subway Construction Company, for the construction by it at the expense of the city, for lease to it for a number of years of a certain railway known as the Brooklyn-Manhattan Rapid Transit Railroad, connecting the southern end of the Manhattan-Bronx Railroad, so as to form a continuous railway over the route running southerly from the post office in the borough of Manhattan under the East River and to the Flatbush Avenue station of the Long Island Railroad in Brooklyn, with an agreement on its part to equip, maintain, and operate the same during the said term. The equipment so supplied was to be the property of the contractor, subject to the city's right to purchase at the end of the term. This contract was likewise modified and supplemented from time to time.

On July 10, 1902, and August 10, 1905, McDonald and the Rapid Transit Subway Construction Company, respectively, assigned, with the consent of the board of rapid transit commissioners, to the plaintiff so much of the No. 1 and No. 2 contracts as applied to the lease of the railways. On July 11, 1911, so much of contract No. 1 as applied to the construction was duly assigned to the Rapid Transit Subway Construction Company. On January 30, 1913, so much of contracts No. 1 and No. 2 as applied to construction were respectively assigned to the plaintiff.

Contract No. 1 contained an agreement for lease by the city to the contractor for a term of 50 years, at a rental of an annual sum equal to the annual interest payable by the city upon all bonds which it should issue in order to provide means for construction, and a further annual sum equal to 1 per cent. upon the whole

amount of the bonds, with certain abatements during the first 10 years. Contract No. 2 contained an agreement for leasing, by the city to the contractor, at a rental consisting in general of an annual sum equal to the annual interest payable by the city upon all bonds issued by it in order to provide means for construction, an annual sum equal to 1 per cent. of the whole amount of the bonds, with certain abatements during the first 10 years, and a further annual sum equal to the amount of the annual interest payable by the city upon bonds issued to provide means to pay for the acquisition of rights of way.

On March 19, 1913, the city, acting by the Public Service Commission for the First District, entered into a contract with the plaintiff for the construction by the city, and the equipment, maintenance, and operation by the plaintiff, of rapid transit railways along the routes known as Seventh Avenue-Lexington Avenue line, Eastern Parkway line, Steinway Tunnel line, and White Plains Road line. The contract provided for the construction by the city, under separate construction contracts, a contribution by the plaintiff toward the cost of the construction and the equipment of the railway by the plaintiff at its own expense and for a lease by the city [*917] of the railway and equipment to the plaintiff for operation in conjunction with the existing railways and existing equipment provided for in contracts No. 1 and No. 2 "for a single fare * * * of 5 cents but no more" for a term beginning January 1, 1917, and expiring December 31, 1965—subject, however, to earlier termination as therein provided. The original terms of contracts No. 1 and No. 2 were modi-

fied as to the expiration of the lease and in other particulars.

By the terms of contract No. 3, it was provided that the plaintiff should pay as long as the existing railroads were operated in conjunction with the new extensions, an additional rental to that contained in contracts No. 1 and No. 2. In consideration of the operation of the railways and existing railway in conjunction with each other for a single fare, and of the contribution by the plaintiff to the cost of construction of the railways and of the agreements to modify the terms of contracts No. 1 and No. 2, upon the commencement of the operation of the portions of the railway specified in the contracts, the gross receipts, from whatever sources derived, directly or indirectly, by the plaintiff in connection with the operation of railways and the existing railways during the term of the contract, were to be disbursed to meet obligations therein specified, after which the city and plaintiff shared the balance in equal parts.

Contracts No. 1 and No. 2 provided for a single fare in the sum of 5 cents, but no more. Contract No. 3 in its terms superseded the provisions of contracts No. 1 and No. 2 as to the rate of fare. It provided for a single fare over the entire system of the railways to be built and the existing railways of "5 cents, but not more."

The Manhattan Railway Company, incorporated under the provisions of the Rapid Transit Act (chapter 606 of the Laws of 1875), was authorized to construct, maintain, and operate elevated railroads along routes

laid out and designated by the rapid transit commission under the authority of that act. It was engaged as a common carrier for many years, and owned elevated rapid transit railways lying within the city of New York, and leased them to the plaintiff, which operated them as part of its general system. The lease, dated January 1, 1903, was for a period of 999 years, and as a rental the plaintiff guaranteed interest on mortgage bonds, paid a cash rental, and guaranteed 7 per cent. dividends on $60,000,000 of the Manhattan Railway Company's stock, and this lease was effective when, on March 19, 1913, by the terms of contract No. 3, the elevated extension certificates were provided for.

The routes under the certificate to the Manhattan Railway Company were formally added to the property leased to the plaintiff for operation. The certificates granted to the plaintiff provided for (1) elevated railroad extensions and (2) additional tracks, and that the plaintiff was entitled to charge a single fare, for each passenger, for one continuous trip in the same general direction of 5 cents, but not more. The additional contract certificate of the same date, granted to the Manhattan Railway Company, contained no provision fixing a rate of fare to be charged thereon.

The Rapid Transit Act was amended in 1912 (chapter 226, subd. 3, §8, Laws of 1912) so as to give additional authority for contract No. 3. Section 7† of the original act had long provided that the contract should contain such terms and conditions as to rates of fare to be charged as said commission shall deem to be best

† Typographical error—should be 27.

suited to the public interest. This provision was part of the act several years before 1907 when the Public Service Commission Law was adopted. The extension certificate was granted under the authority of section 34† of the Rapid Transit Act (as amended by chapter 752 of the Laws of 1894), and it is not claimed to have been given by the amendment of 1912, but it is claimed to have the authority of section 32-a enacted by chapter 472 of the Laws of 1906, adopted one year before the Public Service Commission Act.

The section did not authorize the commission to condition an extension certificate upon a stipulation as to fare. It (section 34†) designates the subjects to be embraced in the certificate, but without reference to fare provisions. This challenges legislative purposes to authorize the insertion or making of a fare provision of any kind. Prior to 1894, no provision of fare of any kind below 10 cents and no restriction upon fares had been imposed by legal authorities as a condition of constitutional consent. Ten-cent limitations were statutory. By chapter 743 of the Laws of 1894, the 5-cent limitation was established, unless the extension certificate of March 19, 1913, or the resolution of the board of estimate, formally approving the proposed certificate, and consenting to the construction and operation of the extensions in accordance therewith, be a constitutional consent to a different fare.

We hold that the 5-cent limitation as to the elevated railway company is statutory under chapter 743 of the Laws of 1894. The [*918] resolution, even if treated

† Typographical error—should be 24.

as a consent of the legal authority under section 18, art. 3, of the Constitution of the state, is ineffective to create any contractual fare limitation, because section 34† of the Rapid Transit Act provided only for such consents as were necessary to be fulfilled in such cases of extensions under section 18 of art. 3, which by no means required fare regulations, but only consent to construct and operate. Under authoritative decisions of the state of New York, where consents were granted after July 1, 1907 (the effective date of the Public Service Commission Law), municipalities were precluded from conditioning their consent upon a fare provision which should be exempt from the application of the Public Service Commission Law. People ex rel. City of New York v. Nixon, 229 N. Y. 356, 128 N. E. 245.

A provision for fare in contract No. 3, as such, does not apply to elevated railways. The phrase of the certificate that the fare limitations shall apply to one continuous trip in the same general direction over the railways (which are defined as including only additional tracks and the extension of certain trackage rights provided for by the certificate) of the Manhattan Railway express service, indicates an intent that the fare shall apply to the latter only where the trip is, in whole or in part, over the railways, and should not be applicable to trips originating and ending on the lines of the then existing Manhattan Railway Company. No fare provision is embraced in the additional contract certificate granted to that company on the same day, which lends support to the same view.

†Typographical error—should be 24.

Opinion of the Special Statutory Court.

The grant of the regulatory power over rates by the Legislature to a commission or municipality must be strictly construed, and must not be extended by inference. The suspension of police power over rates cannot be accomplished by implication. The legislative authority must be plain, and the intention must clearly and unmistakably appear. Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 273, 29 S. Ct. 50, 53 L. Ed. 176.

The provisions of contracts No. 1 and No. 2 as to fares were superseded by the provisions of contract No. 3 providing for a rate of fare to be charged in the operation of new and existing railroads as one completed system. Article 1 of contract No. 3 provided that the new subway lines shall be operated in conjunction with the old for a single fare and in accordance with the contract. The terms of contract No. 3 specifically modified and changed the provisions of contracts No. 1 and No. 2 so as to provide a single fare; it extended the ride over the entire system and for a fare of 5 cents and no more. The railroad is being presently operated under contract No. 3, at least so far as the fare charged is concerned.

The state Court of Appeals, in considering the validity and power to make the contract, has construed No. 3 to supersede the leases of contracts No. 1 and No. 2, saying: "But by the proposed contract [No. 3] this lease is to be modified and superseded by a new agreement whereby the city becomes reinvested with a substantial control thereof and relets them in connection with its new subways under one contract for operation as a single and entire system." Admiral Realty Co. v. City of N. Y., 206 N. Y. 110, 133, 99 N. E. 241, 247 (Ann. Cas. 1914A, 1054). It is not,

as argued, merely a continuation and extension, supplementary of contracts No. 1 and No. 2. Comparing contracts No. 1 and No. 2 with No. 3 makes it clear that there were many modifications as to rentals payable to the city under contracts No. 1 and No. 2. In No. 3 a single fare was intended to be operative, not only over the lines covered by No. 1 and No. 2, but over the new subway and during the longer life of the contract. The fare provisions of No. 1 and No. 2 could not be continued in effect since each was intended to apply to a different period and had a different scope of operation. Therefore the fare provisions of the three contracts could not stand together, because they apply to different things. Contract No. 3 was a modification and a waiver of fare provisions of contracts No. 1 and No. 2.

If plaintiff's right to charge a fare in excess of 5 cents—assuming that rate to be confiscatory—were to be determined solely upon the provisions of contracts No. 1 and No. 2, which were made pursuant to specific authority granted by the state Legislature to the board of rapid transit commissioners to contract for a 5-cent fare, and were such determination to be unaffected by the enactment of the Public Service Commission Law in 1907, and the execution of contract No. 3, the plaintiff would not now be entitled to judicial relief. In such case, only by securing the waiver of the contract rates by an authoritative commission speaking for the state would the railway company have any standing to ask for a change of rates in excess of the contract provision. Columbus Power & Light Co. v. City of Columbus, 249 U. S. 399, 39 S. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648; St. Cloud

Pub. Service Co. v. [*919] City of St. Cloud, 265 U. S. 352, 44 S. Ct. 492, 68 L. Ed. 1050.

But, when contract No. 3 was made, the Public Service Commission Law had been in force and effect since 1907, and the fare provisions of that lease are subject to regulatory revision in the manner prescribed by the Public Service Commission Law. The Rapid Transit Act, which was a special city law (Admiral Realty Co. v. City of New York, 206 N. Y. 110, 140, 99 N. E. 241, Ann. Cas. 1914A, 1054), provided that the rapid transit lines shall be a part of the system of street and highways of the city, and the contract declared it to be a matter of public interest. The exercise by a municipality of its proprietary powers over streets is public in its nature. Contract No. 3 was made in the presence of and with knowledge of the Public Service Commission Law, which law the authoritative decisions of New York courts have held was a new and comprehensive policy of state-wide regulation and which was in terms applicable to rapid transit railways.

Contract No. 3 must be regarded as qualified by the existing restrictions of the Public Service Commission Law, which, among other things, expressly required that rates should be just and reasonable and expressly prohibited rates which should be unjust and unreasonable, whether excessive or because noncompensatory, and it expressly provided that rates not conforming to this legislative standard should be unlawful, and it empowered railway carriers to change rates by filing and publishing tariffs in order to conform to the standard, and imposed the duty, as well as conferred the power, upon the commission to apply and enforce the standard upon applica-

tion of the utilities as well as of the public under sections 26 and 49 of the Public Service Commission Law. For effect and construction of this act by the state Court of Appeals, see People ex rel. City of New York v. Nixon, 229 N. Y. 356, 128 N. E. 245; People ex rel. Garrison v. Nixon, 229 N. Y. 576, 128 N. E. 255; Town of North Hempstead v. Public Service Corp., 231 N. Y. 447, 132 N. E. 144; Public Service Comm. v. Pavilion Natural Gas Co., 232 N. Y. 146, 133 N. E. 427; Evens v. Public Service Comm., 246 N. Y. 224, 158 N. E. 310; People ex rel. N. Y. Steam Co. v. Straus, 186 App. Div. 787, 174 N. Y. S. 868, affirmed 226 N. Y. 704, 123 N. E. 884; International Railway Co. v. Public Service Comm., 226 N. Y. 474, 124 N. E. 123.

The public policy of the state of New York in its regulatory power over utilities was announced in People ex rel City of New York v. Nixon, 229 N. Y. 356, 358, 128 N. E. 245, by the Chief Judge, speaking for a unanimous court, as follows:

"At the date of this franchise, the Public Service Commission was empowered by statute to increase 'the maximum rates, fares, or charges chargeable by any * * * street railroad corporation' when found to be inadequate to yield a fair return (section 49, Public Service Commission Law; Consol. Laws, chap. 48). That power came to the commission through the amendment of the Public Service Commission Law in June 1911 (Laws 1911, c. 546; People ex rel. Ulster & Del. R. R. Co. v. Public Service Commission, 171 App. Div. 607 [156 N. Y. S. 1065], and 218 N. Y. 643 [112 N. E. 1071]), if it did not already exist under the law as first enacted in 1907

(Laws 1907, c. 429, § 49. Cf. the statutes construed in People ex. rel. Village of South Glens Falls v. Pub. Service Comm., 225 N. Y. 216, 223 [121 N. E. 777]; People ex rel. N. Y. Steam Co. v. Straus, 186 App. Div. 787, 793 [174 N. Y. S. 868], and 226 N. Y. 704 [123 N. E. 884], and Arlington Board of Survey v. Bay State Street Ry. Co., 224 Mass. 463 [113 N. E. 273, 5 A. L. R. 24]).

"Contracts fixing rates, if made before the enactment of these statutes, were subject at the utmost to the possibility of the exercise by the state of its police power in the future. Contracts made thereafter were subject to a possibility which had become merged in a reality. It was no longer a question of what the state might do at some indefinite and unknowable time. It was a question of what the state had already done, drawing upon sources of energy, reserves of power, till then latent and potential, and manifesting its will in law. A new public policy had been initiated. A new right had been declared. Rates were thereafter to be just and reasonable, alike for carriers on the one side and for passengers or shippers on the other. Neither class would be permitted for its own benefit to set the rule at nought. The state, through its delegate, the commission, would lower the charges if too high. It would raise them, if too low. People ex rel. N. Y. Steam Co. v. Straus, supra; Arlington Board of Survey v. Bay State Street Ry. Co., supra; Postal Tel.-Cable Co. v. Associated Press, 228 N. Y. 370, 375 [127 N. E. 256]; Armour Packing Co. v. U. S., 209 U. S. 56 [28 S. Ct. 428, 52 L. Ed. 681]; Union Dry Goods Co. v. Georgia Pub. Service Corp., 248 U. S. 372 [39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420].

"Rate-making was to be no longer an [*920] affair of predominantly private interest, in which the state would interfere without system and with spasmodic and intermittent action. A superintending agency of government had taken the matter in hand.

"The question soon arose whether the new rule was retroactive, and annulled existing contracts in conflict with its terms. Indisputably it annulled such contracts between carriers and passengers, or carriers and shippers. Louisville & Nashville R. R. v. Mottley, 219 U. S. 467 [31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671]; People ex rel. N. Y. Steam Co. v. Straus, supra; Postal Tel.-Cable Co. v. Associated Press, supra; Producers' Transp. Co. v. R. R. Comm., California, 251 U. S. 228 [40 S. Ct. 131, 64 L. Ed. 239]. 'One whose rights such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter.' Hudson County Water Co. v. McCarter, 209 U. S. 349, 357 [28 S. Ct. 259, 52 L. Ed. 828, 14 Ann. Cas. 560]; Union Dry Goods Co. v. Georgia P. S. Corp., supra, p. 375 [39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420]."

Later, in Town of North Hempstead v. Public Service Corporation of Long Island, 231 N. Y. 447, 450, 132 N. E. 144, the court said, speaking of the provisions of the Public Service Commission Law:

"These provisions were in force when the plaintiff gave its consent to the defendant to maintain and operate its gas mains within the town, entered by implication into the terms of such consent, formed part of its obliga-

tion, and were notice to the town that the consent was coupled with the provision of the statute that the defendant was empowered to abrogate it as to the rates stipulated therein and was allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service."

The police power is an attribute of sovereignty and is primarily vested in the Legislature. The state may authorize a municipality to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term not grossly unreasonable in point of time, and the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. The surrender by contract, however, of this governmental power, as well as the authority to make it, must be closely scrutinized for such a contract has the effect of extinguishing pro tanto an undoubted power of government; both its existence and authority to make it must clearly and unmistakably appear and all doubts must be resolved in favor of the continuance of the power. Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 273, 29 S. Ct. 50, 53 L. Ed. 176.

If the parties have not thus agreed to a 5-cent fare, when that fare becomes unreasonable, because it is noncompensatory or because it is excessive, the contract furnishes no obstacle to the exercise of jurisdiction by the Public Service Commission, and when it fails to act there is jurisdiction in the federal courts to protect the corporation against confiscation. Southern Iowa El. Co. v. Chariton, 255 U. S. 539, 41 S. Ct. 400, 65 L. Ed. 764; City of San Antonio v. San Antonio Pub. Service Co.,

255 U. S. 547, 41 S. Ct. 428, 65 L. Ed. 777; City of Houston v. Southwestern Bell Tel. Co., 259 U. S. 318, 42 S. Ct. 486, 66 L. Ed. 961; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A. L. R. 916; City of St. Louis v. Public Service Comm., 276 Mo. 509, 207 S. W. 799.

We find nothing in the amendment of the Rapid Transit Act in 1912 which excludes the plaintiff from the application of the regulatory plan and that act contains no clear and unmistakable evidence of effort to delegate to the city authority to establish by contract in 1913 unchangeable rates to be charged by the plaintiff. While contract No. 3 provides for a 5-cent fare to be charged in 1913, there is no delegation in any part of the act of the regulatory power of the state Legislature. Nor was the Public Service Commission Law on the subject of regulation in any wise changed. An intention of the parties that the rates then in question should be subject to modification under the Public Service Commission Law was not affirmatively expressed, but the state courts have announced that there must be read into the contracts made after 1907 the authoritative regulation provided for by the Public Service Commission Law. People ex rel. Garrison v. Nixon, 229 N. Y. 576, 128 N. E. 255.

If these regulatory powers of the Public Service Commission were not intended to apply to the contractual rates of the rapid transit railways, express provision to that effect would be expected. Moreover, the legislation governing the service and the rates of fares of railroads or street railways provided for by statutes passed since 1907 places the power in the Public Service Commission to regulate such rates, indicating that the [*921] regu-

latory power had been reserved. Chapter 481 of the Laws of 1910, § 57; formerly the Railroad Law of 1890 (Laws 1890, c. 565), § 37, as amended by chapter 676 of the Laws of 1892; section 229 of the Railroad Law; Laws 1910, c. 481, formerly part of the Rapid Transit Act of 1875; Laws 1875, c. 606. In construing and giving effect to the provisions of the state statute, we look to the decisions of the state Court of Appeals. St. Cloud Pub. Service Co. v. City of St. Cloud, 265 U. S. 352, 357, 44 S. Ct. 492, 68 L. Ed. 1050. Terms of a contract may be affected by the exercise of sovereign power, as where an injured person received a free pass on a line of a railroad for life under a contract, and later Congress, in regulating interstate commerce, forbade the issuance and use of free passes, except to certain persons designated, and forbade the charging of any rate other than that designated in published schedules. Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. There it was said, at page 483 (31 S. Ct. 271): "After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court." See Hunter v. Pittsburg, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151; Worcester v. Worcester Consolidated St. Ry. Co., 196 U. S. 539, 25 S. Ct. 327, 49 L. Ed. 591. To change a contract rate under the state regulatory plan does not impair contract rights under the federal Constitution. Union Dry Goods Co. v. Ga. Public Service Corp., 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420.

When in 1912 the Legislature of the state amended the Transit Act to give authority for contract No. 3, § 8

of the act provided that the contract should contain "such terms and conditions as to the rates of fare to be charged * * * as said commission shall deem to be best suited to the public interest." Indeed, this was in substance part of the act prior to 1907, when the Public Service Commission Law was adopted. As pointed out, the law had changed the policy existing when the rate provision was brought into the Rapid Transit Act. By express terms and by construction of the Court of Appeals of the state, the legislation resulting in the Public Service Commission Law was applicable to rapid transit rates and established a public policy prohibitive of permanent rates of fare. It declared in effect that no contract provision for a fixed continuing fare was "best suited" to or consistent with "public interest," and by section 26 it provided that "every unjust or unreasonable charge made or demanded for any such service or transportation of passengers, freight or property or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited." And section 49 of the act established the legislative policy that a rate was unjust and unreasonable, if insufficient to yield a reasonable compensation for the services rendered.

Thus the law created the duty of the Public Service Commission to administer and enforce the new state policy. That regulatory body had turned over to it all contractual powers of the former board under the Rapid Transit Act. It in effect limited the contractual capacity for a continuing fixed fare, for it made it the duty of the Public Service Commission to make the fare sufficient to yield reasonable compensation for the services

rendered and no more. Undoubtedly this new public policy applied to rapid transit railroad carriers, as well as other public utilities.

With this policy thus established when the Legislature in 1912 amended the Rapid Transit Act, if it wanted to depart from the Public Service Commission Law, to amend it or modify it, or if it intended to grant regulatory powers under the Rapid Transit Act, it would have been an easy matter for the Legislature to have written into that act a statement excepting the rapid transit rates from the operation of the Public Service Commission Law. It refrained from doing so by word or fair implication. It left the fare provision of the Rapid Transit Act as it was before the adoption of the regulatory law which established the new policy. It in no clear and unmistakable phrase expressed an intention to nor did it delegate regulatory powers to the commission under the Rapid Transit Act. That had been cared for by the Public Service Commission Law.

Merely permitting the fare provision of the Rapid Transit Act to continue in the same phrase in which it existed prior to the adoption of the new policy in 1907 did not repeal the provisions of the Public Service Commission Law as to rate-making in any particular. The more reasonable assumption is that such nonaction involved no clear and unmistakable purpose on the part of the Legislature (City of Paducah v. Paducah Ry. Co., 261 U. S. 267, 272, 43 S. Ct. 335, 67 L. Ed. 647) to exclude the application of the Public Service Commission Law. The fare provision of the Rapid Transit Act, as amended by the Legislature in 1912, did not purport to

grant unqualified authority to [*922] contract for a fixed rate for the entire life of the contract.

The more reasonable view is that there should be contained in the contract "such terms and conditions as to rates of fare to be charged as the commission shall determine to be best suited to the public interest." Such "terms and conditions" should be consistent with the limitations and provisions of the Public Service Commission Law and be the contractual authority, thus confined to the establishing of temporary rates, and should not foreclose either party, if and when it became unjust and unreasonable, either because it was excessive or noncompensatory, to apply for a change. This does not destroy all right to fix a fare; it merely limits the contractual powers within the confines of the established public policy, which prohibited the suspension of the police power of the state over rates. It means that the contractual determination as to what terms and conditions as to rates of fare that are best suited to public interest must be in harmony, and not in defiance of the standard of public interest which the Legislature had itself declared and established in a law which it made applicable to all street railways and utilities.

Such a construction takes no undue liberty with the fare provision of the Transit Act. It restricts general and uncertain language and prevents nonaction of the Legislature with respect to the Transit Act from operating as an amendment to the Public Service Commission Act. By the language employed in the amendment of the Transit Act in 1912, it is inconceivable that it was the intent to vest the city with unrestrained discretion to

suspend the police power over rates and leave it within its uncontrolled discretion to burden the city for an unlimited period, with an exorbitant or extortionate fare, or to condemn it to an inefficient service which would result from a noncompensatory rate.

Indeed, section 8, subd. 3, of the act provides: "Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said commission shall deem to be best suited to the public interest, and subject to such public supervision, and to such conditions, regulations and requirements as may be determined upon by said commission, with like approval." There was no commission, other than the Public Service Commission to then or thereafter exercise this power and duty, both as to fares and services. Indeed, the commission has ever since been constantly exercising supervision as to service, but has refused to act in the matter of fares.

There has been no contracting away of the right to a reasonable return as in Southern Utilities Co. v. City of Palatka, 268 U. S. 232, 45 S. Ct. 488, 69 L. Ed. 930, and Columbus Ry., etc., Co. v. City of Columbus, 249 U. S. 399, 39 S. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648. In the latter case, a franchise was granted a railroad company which sought to surrender it and then brought an action to restrain the city authorities from compelling it to operate its lines of street railway under the franchises and to charge only rates of fare prescribed by the franchises. The court held that equity cannot relieve the company from a bad bargain. At the time the railroad

company sought relief, the Legislature of Ohio had not, like in the instant case the Legislature of New York had, in the exercise of state sovereignty, established a regulatory plan by which franchises and contract rates may be regulated upward or downward as conditions justify.

In Henderson Water Co. v. Corporation Comm., etc., 269 U. S. 278, 46 S. Ct. 112, 70 L. Ed. 273, the parties were bound by the contract made before the state had adopted its Corporation Commission Law and thereby exercised its regulatory power. The corporation applied for an increase in rates to the Corporation Commission and was allowed one-half the amount asked for. It was not content, but proceeded in the federal court, asking protection against confiscation. The Supreme Court affirmed the District Court in its view that the water company should have applied for resumption of the hearing after a test of six months on the new rates, and exhausted its remedy there, before it resorted to a rate suit. There the state Supreme Court sustained the power of the commission to fix rates different from the rates stipulated in the franchise.

The claim of the plaintiff here is that the contract rates could be changed only by resorting to the procedure of the regulatory plan of the state which delegated power to the commission under section 49 of the Public Service Commission Law and power to the plaintiff under sections 28, 29, to change the rates by the methods therein prescribed. This it had sought without avail, previous to the institution of this suit. In Southern Utilities Co. v. Palatka, 268 U. S. 232, 45 S. Ct. 488, 69 L. Ed. 930, the Florida Legislature had vested the

city with power to make a rate by contract, but the Legislature had no commission and no regulatory procedure which the corporation could invoke to bring [*923] about an increase which it sought. The Supreme Court held that the corporation was bound by its contract, but pointed out that "there is nothing in this decision inconsistent with Southern Iowa Electric Co. v. Chariton, 255 U. S. 539 [41 S. Ct. 400, 65 L. Ed. 764]; San Antonio v. San Antonio Public Service Co., 255 U. S. 547 [41 S. Ct. 428, 65 L. Ed. 777]; and Ortega Co. v. Triay, 260 U. S. 103 [43 S. Ct. 44, 67 L. Ed. 153]."

In City of Cleveland v. Cleveland Ry. Co., 194 U. S. 517, in sustaining the contract, the court held that the provisions as to the rate of fares were fixed in the ordinance for a stated time and "no reservation was made of a right to alter." In Georgia Ry. & Power Co. v. Town of Decatur, 262 U. S. 432, 43 S. Ct. 613, 67 L. Ed. 1065, when the contract was made, the General Assembly had never exercised authority to fix rates, and the state Supreme Court held that there was nothing in the Constitution of the state which precluded the municipality from contracting as to fares, and that "while the matter was one falling within the police power, whose exercise could not be abridged by contract, it was competent for the municipality to enter into such a contract where the state had not exercised and was not seeking to exercise its police power over the subject, and that this contract would remain effective until there should be conflicting legislative action."

In Tampa Water Works v. Tampa, 199 U. S. 241, 26 S. Ct. 23, 50 L. Ed. 170, the state Constitution provided

that "the Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures." Pursuant to this clause, an act was passed empowering the city authorities to pass an ordinance to prescribe maximum charges for water, "such charges to be just and reasonable: Provided, that this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm, or corporation for the supply of water to such city, town, or village or its inhabitants. But this act shall not be held to validate any contract heretofore made." After the Constitution, but before this act, the city made a contract with the water company giving the company the right to charge certain rates. Thereafter, pursuant to the constitutional provision and the act referred to, the city passed an ordinance lowering the maximum rates to be charged. The court sustained the validity of the ordinance. It followed the interpretation of the Constitution, act, and ordinance as construed by the state court, and said:

"But so far as it expressed a power of the Legislature, of course, as soon as the Constitution went into effect, that power existed at once, and contracts afterwards were made subject to the possibility of its exercise, as it was exercised by the subsequent statute. * * * The single question is whether the city of Tampa is bound for 30 years from the date of its agreement to permit

certain specified rates to be charged, even if they have ceased to be reasonable. We are not prepared to say that the Supreme Court of Florida was wrong in deciding that it is not bound under the Florida Constitution and laws."

It further held that, under the interpretation of the Constitution given by the Florida courts, the Legislature was not at liberty to give up the duty of preventing excessive charges. It was an inalienable power. To like effect, see San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 26 S. Ct. 261, 50 L. Ed. 491; Puget Sound Traction, etc., Co. v. Reynolds, 244 U. S. 574, 37 S. Ct. 705, 61 L. Ed. 1325; City of Houston v. Southwestern Bell Tel. Co., 259 U. S. 318, 42 S. Ct. 486, 66 L. Ed. 961.

The rule is well established that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. Milwaukee Electric Ry. & Light Co. v. R. R. Comm. of Wisconsin, 238 U. S. 174, 180, 35 S. Ct. 820, 59 L. Ed. 1254; Home Tel. Co. v. Los Angeles, 211 U. S. 265, 273, 29 S. Ct. 50, 53 L. Ed. 176. This construction is consistent with the state court decisions to which we should give sanction. Denney v. Pacific Tel. & Tel. Co., 48 S. Ct. 223, 72 L. Ed. — (decided Feb., 1928).

It is argued that the commission, as a state agency, could exercise or not, in its discretion, this power, but that meanwhile it lies as dormant as though no public service law had been adopted. Constitutional limitations require the Legislature itself to determine the public policy as to rates and itself to establish a legislative

standard to be applied and executed by the delegated agency. That was what the Legislature did in the Public Service Commission Law. It declared a public policy as to rates and established a standard in the law itself (section 26). The [*924] commission was created by the law, not to initiate or establish a public policy or standard, but to administer and execute that established by the Legislature. Section 26 expressly prohibited the carrier itself from charging or collecting an unreasonable rate, thereby directly requiring that rates should at all times be kept reasonable in fact. Section 49 imposes upon the commission a duty to apply or execute that mandate of the law.

The guaranty of due process of the Fourteenth Amendment protects the right of a public utility to a fair return. There is but one limitation upon the right, namely, that it has not been contracted away pursuant to clear and unmistakable legislative authority to suspend the police power over rates. That condition does not obtain here. As said by Chief Justice White in So. Iowa El. Co. v. Chariton, 255 U. S. 539, 546, 41 S. Ct. 400, 402 (65 L. Ed. 764): "And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law."

We therefore hold that the provisions of the lease in contract No. 3, "the lessee shall during the term of the contract be entitled to charge for a single fare upon the

railroads and existing railroads the sum of 5 cents, but not more," was subject to the regulatory law and power of the Public Service Commission as effectively as though written in the contract, which means that, when this fare of 5 cents became unjust and unreasonable, it was subject to the commission's regulation. This marked the extreme limit of the power of the parties to contract as to the fare. When this provision of the contract bound the plaintiff to a 5-cent fare and the same became confiscatory, it contravened the express prohibition against the charging or collecting of unjust and unreasonable rates under section 26, and in turn the public policy which thus inhibited the suspension of the police power.

The complaint, and affidavits in support thereof, show that for the year ending June 30, 1927, the plaintiff carried 1,173,646,256 passengers; of these 359,019,660 were carried by the elevated railroads. During the year the daily average was about 3,215,469 passengers. The plaintiff's railway system is divided into the Manhattan Division and the Subway Division. The total value (1927) of the property used in the system operated by the plaintiff is alleged by it to be $898,793,648, of which $142,894,000 is provided by the Manhattan Railway Company; $140,579,474 is owned by the plaintiff and it has provided in addition $272,940,174; $342,380,000 is provided by the city. There is a total, as alleged, of $556,413,648 of property provided by the plaintiff.

The plaintiff has $35,000,000 par value of common stock; $162,700,000 refunding mortgage bonds; $44,331,560 in notes and $2,890,000 in equipment trust

certificates, which, together with other items, make an aggregate of its liabilities $403,950,373, which has not been substantially reduced since June 30, 1927. On that day, the charges of the plaintiff to its fixed capital, as defined by the uniform system of accounts, as ruled by the Public Service Commission, amounted to $413,-312,720, which has not been substantially reduced since then. On January 31, 1928, the Manhattan Railway Company had outstanding $60,000,000 of common stock, $40,671,000 in consolidated bonds, $4,523,000 in second mortgage bonds, and other liabilities of $1,-851,159, making a total of $107,045,159. At that date the fixed capital of the company was $112,943,654. The operation by the plaintiff upon a computation based on the plaintiff's present value figures of property provided by the companies, and on the transit commission figures for the city provided property, shows an actual earned return of 2.65 per cent. in 1926 and 2.52 per cent. in 1927. The earnings available at the present rate of fare are $22,622,761.

Using the value of the property thus computed in 1927 at $898,793,648, an 8 per cent. return (McCardle v. Indianapolis Co., 272 U. S. 419, 47 S. Ct. 144, 71 L. Ed. 316; Bluefield Water Works & Improvement Co. v. Public Service Commission of State of West Virginia, 262 U. S. 692, 43 S. Ct. 675, 67 L. Ed. 1176; Brush Electric Co. v. Galveston, 262 U. S. 443, 43 S. Ct. 606, 67 L. Ed. 1076; Brooklyn Union Gas Co. v. Prendergast (D. C.), 7 F. (2d) 672, affirmed 272 U. S. 580, 47 S. Ct. 199, 71 L. Ed. 421) would require at least $71,903,492—which would leave a deficit of $49,-280,731. Using this property, the actual return was

as low as 1.92 per cent. in 1921 and never higher than 2.65 per cent. in 1926. A computation based upon the present value of the property provided by the plaintiff, exclusive of city provided property, shows a 3.61 per cent. return actually earned in 1927; this is reached upon the assumption that the present value of the company owned and company provided property amounts to $554,413,648, with a balance of $24,490,775 [*925] available as a return, leaving a deficit of $24,335,899 in earnings below an 8 per cent. return. A computation based alone upon the present value of the company owned property, exclusive of the city owned property and company provided property, shows a 4.05 per cent. return actually earned in 1927.

It is argued that, if the plaintiff prevails and there is daily confiscation, the city owned property may not be taken into consideration. The return guaranteed by the Constitution is upon the property devoted to public use. The determination of what rate should be prescribed, which will yield a return that is fair and reasonable, depends upon the present value of the property used. Ottinger v. Brooklyn Union Gas Co., 272 U. S. 579, 47 S. Ct. 199, 71 L. Ed. 421; State of Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm., 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807; Willcox v. Consol. Gas Co., 212 U. S. 19, 52, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. In Willcox v. Consol. Gas Co., supra, the court said: "And we concur with the court below in holding that the value of the

property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase."

And in the Minnesota Rate Cases, supra: "The making of a just return for the use of the property involves the recognition of its fair value, if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." Property leased by the operating company and used in making a return is included in the valuation. Minn. Rate Cases (C. C.) 184 F. 765, affirmed 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. In Bd. of Public Utility Com'rs. v. N. Y. Tel. Co., 271 U. S. 23, 31, 46 S. Ct. 363, 366 (70 L. Ed. 808), the court said:

"The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory. [Citing cases.] Constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. * * *"

The city's property is earning the return as well as the plaintiff's and the plaintiff's leased railway. All

must be considered in calculating the capital making the return and rendering the service.

The denial by the commission of a change of rate of fare is a denial of due process of law. The Commission did more than refuse to act. On February 14th, rejecting the proposed new rates, it instituted injunction proceedings to forbid their operation. A forced continuance of confiscatory rates amounts to a denial of due process of law. Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510; Alton Water Co. v. Ill. Commerce Comm. (D. C.) 279 F. 869. Under the present rate of fare, it is established that upon the investment there would be a continuous confiscation, and this amounts to taking property without due process of law in contravention of the Fourteenth Amendment to the federal Constitution. Newton v. Consolidated Gas Co., 258 U. S. 165, 42 S. Ct. 264, 66 L. Ed. 538; Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 S. Ct. 338, 64 L. Ed. 596; La. Water Co. v. Public Service Comm., etc. (D. C.) 294 F. 954; Streator Aqueduct Co. v. Smith, (D. C.) 295 F. 385; Augusta-Aiken Ry. & Electric Corp. v. R. R. Comm. of So. Carolina (C. C. A.) 281 F. 997. The plaintiff, having established its claim of confiscation of its property, is entitled to the injunctive relief it seeks.

In conclusion, we take notice of the views expressed by counsel on the argument, who criticized the plaintiff for proceeding in the District Court, as said, in an effort to defeat the state court of its jurisdiction. This court takes jurisdiction, not as a matter of discretion or comity, but as a matter of duty, and it is not important

whether the state court might have heard the case. There is no discretion or comity. A federal court when appealed to in protection of constitutional rights over which it has, by law, jurisdiction, may not avoid assuming jurisdiction. Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257. When it properly assumes jurisdiction, the court may not be spoken of as precipitate in its conduct. Because the case is one of local interest only is entirely immaterial. If the parties are citizens of different states, or there is brought into question constitutional protection, the right of a plaintiff to choose the federal [*926] court, where there is a choice, cannot properly be denied. Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034.

Plaintiff did all it could under the state law to obtain administrative relief and its two applications, even prior to the present effort to obtain relief were denied, the claim of the commission being that the contract forbade its acting in regulation of the rates. This squarely raised the question of the plaintiff's constitutional right to protection and this is pressed in the familiar form of a rate suit and it has established its claim of daily confiscation.

An injunction will issue against the defendants and their successors, restraining them and each of them, their officers, agents, and employees, from in any way enforcing or attempting to enforce against the plaintiff a rate of fare of 5 cents per passenger for the transportation of passengers upon the rapid transit railroad lines operated by it or upon it and the Manhattan divi-

sion and the subway division, or from enforcing or attempting to enforce against the plaintiff orders, directions, tariff schedules or certificates in so far as they prohibit or have been or are construed by any of the defendants or their predecessors, to prohibit the plaintiff from charging for the transportation of passengers on its railroad lines, a fare per passenger in excess of 5 cents, and the plaintiff, until the report of the master to be appointed to take proofs and the report to this court, may charge 7 cents per passenger over its rapid transit railway lines operated by it without interference or prohibition by the defendants, their officers, agents, servants, or employees.

The order will provide that the plaintiff shall file with the clerk of this court a good and sufficient bond, in a sum to be approved by this court, conditioned upon the prompt payment to the defendants, of all costs and damages which may be incurred or suffered by any party to this suit who may be found to have been wrongfully enjoined or restrained hereby, and further conditioned so that, in the event that this preliminary injunction order shall be hereafter dissolved, the plaintiff will repay to its several passengers affected thereby, with interest, in such manner and to such extent as the court may direct, any sums paid by them for transportation furnished by the plaintiff from the date of the entry of the order and pending the suit in excess of the sums now chargeable to them of 5 cents per passenger. A master will be appointed to take proofs and report to this court.

If the defendants feel aggrieved, and wish to appeal from the order to be entered herein, a stay will be

granted upon condition that a bond of the city in a sufficient sum be furnished indemnifying the plaintiff against further daily confiscation of its property, or if it be otherwise advised, and the defendants wish to apply to the Supreme Court for a stay of the order to be entered until that court hears the appeal, a stay for a reasonable time will be granted to enable the defendants to make such application to the Supreme Court.

KNOX and BONDY, District Judges, concur.

DECREE.

Per Curiam. This cause came on to be heard under an order to show cause granted February 28, 1928, upon the application of the plaintiff, and was argued by counsel, and thereupon, upon consideration thereof, and the opinion of the court having been filed herein on May 2, 1928, and it appearing to this court that the present maximum rate of fare of 5 cents per passenger upon the rapid transit railroad lines operated by the plaintiff, and upon each the Manhattan division and the subway division thereof, has been, and now is, and will continue to be, insufficient to yield a reasonable compensation for the service rendered and to provide a fair return upon the fair and reasonable value of the property used by the plaintiff in the public service, and unjust, unreasonable and confiscatory of the property used by the plaintiff in the public service, and will inflict a continuing daily confiscation of its property, against which the plaintiff is entitled to be protected or indemnified, during the pend-

ency of this suit; that the enforcement of such maximum fare of 5 cents and of the legislative acts or acts legislative in character of the state of New York imposing or requiring the observance of such rate of fare, contravene the guaranties of the Fourteenth Amendment of the Constitution of the United States; that the enforcement or the attempting of the enforcement in any way against the plaintiff of a rate of fare of 5 cents per passenger for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan division and the subway division thereof, or the enforcement or the attempting of the enforcement against the plaintiff of legislative acts of the state [*927] of New York, and particularly the provisions of the Public Service Commission Law (chapter 429 of the Laws of 1907, made chapter 48 of the Consolidated Laws by chapter 480 of the Laws of 1910, as amended and supplemented), chapter 743 of the Laws of 1894, the Rapid Transit Act (chapter 4 of the Laws of 1891, as amended and supplemented), and the Railroad Law (chapter 481 of the Laws of 1910, as amended and supplemented); of orders or directions of the Transit Commission and/or the Public Service Commission for the First District of the state of New York; of the tariff schedules published and filed by the plaintiff, of the contracts Nos. 1, 2 and 3, dated respectively February 21, 1900, July 21, 1902, and March 19, 1913, and their modifications, and/or of the certificates for elevated extensions and third-tracking, dated March 19, 1913, in so far as the said statutes, orders, directions, schedules, contracts, and/or certificates, or any of them, prohibit, or have been or are construed by any of the defendants or their predecessors

to prohibit, the plaintiff from charging for the transportation of passengers on the rapid transit railroad lines operated by it, or on any thereof, a fare per passenger in excess of 5 cents, will result in immediate, continuing and irreparable loss and damage to the plaintiff unless a preliminary injunction is granted herein, as hereinafter set forth:

It is ordered, adjudged, and decreed as follows:

First. Pending the final decree in this action, and until the further order of this court, the defendants John F. Gilchrist, Leon G. Godley, and Charles C. Lockwood, constituting the transit commission, the same being the Metropolitan division of the department of public service of the state of New York, and the defendant the city of New York, and their successors, and each of them, and their privies, and each of their respective officers, agents, counsel, servants, and employees, and any and every person acting or attempting to act under and by virtue of the authority of the acts of the Legislature of the state of New York, the orders or directions of the said transit commission or its predecessors, the tariff schedules filed by the plaintiff with the said transit commission or its predecessors, the contracts Nos. 1, 2, and 3, dated respectively February 21, 1900, July 21, 1902, and March 19, 1913, with their respective modifications, or the certificates for elevated extensions and third tracking, dated March 19, 1913, or of any of them, or of any other provision of statute of the state of New York, be and are hereby enjoined and restrained—

(1) From in any way enforcing or attempting to enforce, against the plaintiff, a rate of fare of 5 cents per

passenger for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan division and the subway division thereof.

(2) From in any way enforcing, or attempting to enforce, against the plaintiff, the provisions of the said acts, orders, contracts, tariff schedules, or certificates, in so far as they prohibit, or have been, or are construed by any of the defendants or their predecessors, to prevent the plaintiff from charging for the transportation of passengers on its rapid transit railroad lines, or upon each the Manhattan division and the subway division thereof, a fare per passenger in excess of 5 cents.

(3) From bringing and/or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, chapter 743 of the Laws of 1894, or any other law, the said orders or directions, the said contracts Nos. 1, 2, and 3, or the said elevated railroad certificates, against the plaintiff, or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff with the provisions of the said acts, orders, tariff schedules, contracts, or certificates, or any of them, in so far as they, or any of them, impose a maximum rate of fare of 5 cents per passenger, or prohibit the plaintiff from charging a rate of fare of 7 cents per passenger, or any rate in excess of 5 cents per passenger, upon the said rapid transit railroads or upon each the Manhattan division and the subway division.

(4) From doing any act or thing interfering with the right or authority of the plaintiff forthwith to charge

or receive for the transportation of passengers by it, upon the said rapid transit railroad lines, or upon each the Manhattan division and the subway division, a rate of fare of 7 cents per passenger.

Second. This injunction is granted, and will be continued, upon condition that, pending final decree in this action or until the further order of this court—

(a) The plaintiff shall, from and after the entry of this decree, except as hereinafter provided, charge and collect a rate of fare of 7 cents per passenger upon the rapid transit railroads operated by it, as shown by [*928] its tariff schedules on file with the Transit Commission and posted in its several stations, and shall issue to each passenger paying such fare a refund ticket for each fare paid, such refund ticket to read and be conditioned as hereinafter provided.

(b) Within five days after the entry of this order, the plaintiff shall file with the clerk of this court, in form and tenor first approved by one of the judges of this court a good and sufficient bond or bonds of a surety company or companies, in the sum of five million dollars ($5,000,000), conditioned upon the prompt payment by the plaintiff to the defendants, upon the direction of the court, of all costs and damages which may be incurred or suffered by any of them, respectively, who may be found to have been wrongfully enjoined or restrained hereby, and further conditioned so that, in the event that this preliminary injunction order shall hereafter be dissolved, and it shall be finally decided that the plaintiff was and is not entitled to relief in this action, the plaintiff shall promptly repay to its several passengers affected

thereby, to such extent as the court may direct and in the manner hereinafter provided, and/or as the court may further provide and direct, any sums paid by such passenger for transportation upon the rapid transit lines operated by the plaintiff, pending the final determination and decree in this suit, in excess of the sums now chargeable to them at the rate of 5 cents per passenger; any such repayments to passengers to carry and include interest upon such excess sums from and after the 16th day of the month in which any such fares in excess of 5 cents were paid by any such passenger.

(c) As and when the excess of the amount collected by the plaintiff over the rate of 5 cents per passenger shall aggregate the said sum of the bond or bonds so given by the plaintiff, the plaintiff shall furnish and file a similar bond or bonds in a like sum and upon the same approval and conditions, or in such sum and/or upon such conditions as the court by further order, upon its own motion or the application of any party hereto upon notice, may direct.

(d) During the pendency of this action, the plaintiff shall cause to be placed and kept posted on its bulletin board or other conspicuous place, in each of its subway and elevated stations, and in or near all places where copies of its tariff schedules are posted, a notice in plain and conspicuous type and color, in substantially the following form:

"Keep Your Refund Tickets In Order to Protect Your Rights.

"Pursuant to the order entered by the United States District Court for the Southern District of New York

on May—, 1928, the Interborough Rapid Transit Company has been authorized to charge and collect a fare of 7 cents per passenger, pending final decree in the action brought by the company to enjoin the 5-cent rate as confiscatory. The amounts collected by this company in excess of five (5) cents per passenger will be subject to the further direction of the court.

"Refund will be made as so directed, if it shall be finally decided that the company was and is not entitled to charge and collect a fare of more than 5 cents per passenger. The company has filed a bond to insure such repayment to its patrons.

"Each passenger, upon paying his fare, will therefore receive a refund ticket for the excess over 5 cents. These tickets should be carefully preserved, as they will evidence the passenger's right to receive repaymnt of such sums as may be directed by the court, pursuant to the said order, in the event the said action is finally decided against the company.

"For a copy of the said order and further information as to the rates of this company and the regulations applicable thereto you may examine the copy of its tariff schedule, on file with each of its ticket agents and in the offices of the transit commission at No. 270 Madison Avenue, Borough of Manhattan, New York City.

"Frank Hedley,
"President Interborough Rapid Transit Company."

The plaintiff shall cause a copy of this order to be filed and kept with and as a part of its tariff schedule, during

the continuance of this preliminary injunction, in all stations, offices, and places where its said tariff schedule is now posted or filed.

(e) During the pendency of this action, the plaintiff shall cause to be placed, in red ink or other distinctive color or colors, conspicuously on one side of each such refund ticket issued by it to its passengers at a rate of fare in excess of 5 cents per passenger, the figure and word "7 cents" and the words:

"Keep This Slip to Protect Your Rights."

And on the reverse side of each such refund ticket the plaintiff shall cause to be [*929] printed a notice in substantially the following form:

"If it is finally determined that this company is not entitled to charge more than *five cents* per passenger, refund upon this ticket will be made as directed by the order of the United States District Court."

(f) If the plaintiff shall, for the convenient operation of its said rapid transit lines at the said rate of fare of 7 cents per passenger during the pendency of this suit, issue and sell any tokens or other evidence of the right of a purchaser to a single and continuous ride upon the said lines as in the said tariff schedules provided, any such token or evidence of the right of the purchaser to such transportation shall be so accepted for such transportation only during the continuance of the seven-cent fare granted by this preliminary injunction, but shall be redeemed by the company in cash, at any of its said stations, at any time upon the request of the holder thereof, upon the presentation of the same and of a like num-

ber of refund tickets, irrespective of whether this order is or is not in effect at the time of such presentation for redemption; other reasonable rules and regulations pertinent to any such tokens and refund tickets and not inconsistent with this order may be established as a part of the tariff schedules of the plaintiff.

(g) The plaintiff shall bring this cause to trial and to final decree with all convenient speed.

Third. During the pendency of this suit, the plaintiff shall file, on the 16th day of the month following and on the 16th day of each and every month thereafter, in the office of the clerk of this court, a statement verified by its president, vice president, comptroller, secretary, or other authorized officer, showing the amounts charged and collected by it during the preceding calendar month, from passengers on the rapid transit railroads operated by it, in excess of a rate of fare of 5 cents per passenger; such verified statement also to certify that the sum so shown is all that has been so charged and collected during such preceding calendar month.

Fourth. (1) Hon. John Proctor Clarke is hereby appointed special master to take the testimony and evidence upon the issues herein, make all needed computations and fully hear the facts, and to report to the court his findings of fact and conclusions of law, together with the evidence, for the advisement of the court: Provided that nothing herein contained shall be construed as meaning that the special master's findings of fact shall be final, but only that he shall find the facts for the purpose of aiding the court and making his recommendations. The said master shall, before submitting to the court his final re-

port, and in accordance with the practice in this court, prepare and serve on the solicitors for the respective parties hereto a draft of such report.

(2) The said special master shall hold a session on May —, 1928, at 10.30 o'clock in the forenoon, at a place to be determined and announced by him, for the purpose of fixing at that time the date when he will proceed to the hearing of the testimony and evidence in this cause. After the master shall have entered upon said hearing, he shall proceed as speedily as practicable.

(3) The said master shall report to the court, at the earliest practicable date, all the testimony and evidence received by him, together with his findings of fact and his recommendations as to the facts and the law.

Fifth. At any time while the preliminary injunction hereinbefore granted remains in force, any party hereto, or his or its successors or assigns, may apply, upon notice, to vacate, modify, or change the terms of this order, because of any change of circumstances since the entry hereof, or for any additional relief to which he or it may deem himself or itself entitled by reason of any acts or events occurring after the entry of this order.

Sixth. (1) If an appeal from this order is taken by the defendants, or any of them, to the Supreme Court of the United States, then, upon condition that, on or before May 28, 1928, a good and sufficient bond or bonds of the city of New York and/or other responsible corporation be filed by or in behalf of the defendants or any of them, in the sum of $5,000,000 and in a form and tenor to be approved by one of the judges thereof, conditioned for

the indemnifying of the plaintiff against further daily confiscation of its property during the pendency of such appeal, a stay of the taking effect and operation of this injunction and of each of the various provisions of paragraph "Second" of this order, until the hearing and determination of such appeal, is hereby granted, and if it shall appear at any time before an appeal is heard and determined that such bond is inadequate protection, an application will be entertained for further indemnity.

(2) The defendants having given notice of intention to appeal from this order and having applied to one of the Justices of the [*930] Supreme Court of the United States for a stay of the taking effect of this order, when entered, until that court hears and determines such appeal, and May 14, 1928, having been appointed by the Supreme Court when such application by the defendants for such a stay may be heard, it is hereby ordered that a stay of the taking effect of this injunction and of the several provisions of paragraph "Second" of this order is hereby granted to the defendants, until the hearing and determination by the Supreme Court of such application for a stay pending appeal from this order.

(3) The stay granted to the defendants by subdivision (2) of this paragraph is granted, and shall continue in force, only upon condition that the defendants, and each of them, shall make their application to the Supreme Court for a stay so that the same may be heard by the full court on Monday, May 14, 1928, or such other days as appointed by the court, and shall seasonably submit all papers in support of such application within the times allowed by the court; and the stay granted to the defend-

ants by subdivision (1) of this paragraph shall be in effect only upon condition that the defendants, and each of them, appealing from this order, shall perfect and prosecute any such appeal and print and file the transcript of record and all necessary papers to that end, promptly and without unreasonable delay, and shall, with all convenient speed thereafter, serve a notice of application to the Supreme Court to advance the said appeal for early hearing upon the calendar of the said court.

Provision of Constitution of the State of New York as to Consents for Construction or Operation of Street Railroads.

ARTICLE III.

§ 18. CASES IN WHICH PRIVATE OR LOCAL BILLS SHALL NOT BE PASSED.

GENERAL LAWS TO PROVIDE FOR ENUMERATED CASES.

RESTRICTIONS ON LAWS GOVERNING STREET RAILROADS.

* * * * * *

But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

(Amendment of 1874, in effect January 1, 1875; amended in 1901.)

Public Service Commissions Law of the State of New York.

LAWS OF 1907, CHAPTER 429.

Pertinent sections shown are as of March 19, 1913, the time of making Contract No. 3 (except as otherwise indicated), together with notes showing, where material, the amendments, if any, before and after that date.

ARTICLE I.

PUBLIC SERVICE COMMISSIONS; GENERAL PROVISIONS.

§ 2. DEFINITIONS.

5. The term "street railroad," when used in this chapter, includes every railroad by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city, village or town, and including all equipment, switches, spurs, tracks, right of trackage, subways, tunnels, stations, terminals and terminal facilities of every kind used, operated or owned by or in connection with any such street railroad; but the said term "street railroad," when used in this chapter, shall not include a railroad constituting or used as part of a trunk line railroad system.

6. The term "railroad," when used in this chapter, includes every railroad, other than a street railroad, by

whatsoever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, equipment, switches, spurs, tracks, stations and terminal facilities of every kind used, operated or owned by or in connection with any such railroad.

7. The term "street railroad corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any street railroad or any cars or other equipment used thereon or in connection therewith.

8. The term "railroad corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any railroad or any cars or other equipment used thereon or in connection therewith.

9. The term "common carrier," when used in this chapter, includes all railroad corporations, street railroad corporations, express companies, car companies, sleeping-car companies, freight companies, freight-line companies, and every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any such agency for public use in the conveyance of persons or property within this state; but the said term common carrier, when used in this chapter, shall not include an express company unless

the same is operated wholly or in part upon, or in connection with a railroad or street railroad.

§ 3. PUBLIC SERVICE DISTRICTS. There are hereby created two public service districts, to be known as the first district and the second district. The first district shall include the counties of New York, Kings, Queens and Richmond. The second district shall include all other counties of the state.

This section (3) was repealed by Chapter 134 of the Laws of 1921. Prior to its repeal it was amended by the addition of the word "Bronx," added by Chapter 422, Laws of 1916.

§ 4. PUBLIC SERVICE COMMISSIONS ESTABLISHED; APPOINTMENT; REMOVAL; TERMS OF OFFICE. There shall be a public service commission for each district, and each commission shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter. The commission of the first district shall consist of five members, and the commission of the second district shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate, one of whom designated by the governor shall, during his term of office, be the chairman of the commission of which he is a member. Each commissioner shall be a resident of the district for which he is appointed. • • •

By Chapter 263 of the Laws of 1919 the Commission for the First District was reduced to one member.

By Chapter 134, Laws of 1921, the above portion of Section 4 was amended by restricting the Public Service Commission established to a single body of five commissioners and by eliminating the requirement as to residence. By the same act a new section, 4-a, was added, the pertinent part of which reads as follows: "§ 4-a. TRANSIT COMMISSION; ESTABLISHED; APPOINTMENT; TERM; REMOVAL. There shall be a transit commission for cities

containing a population of more than one million inhabitants, according to the last preceding federal census or state enumeration, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter. The commission shall consist of three members to be appointed by the governor, by and with the advice and consent of the senate, for terms of five years from the date of appointment. A member of the commission designated by the governor shall, during his term of office, be the chairman of the commission. * * *"

§ 5. JURISDICTION OF COMMISSIONS. 1. The jurisdiction, supervision, powers and duties of the public service commission in the first district shall extend under this chapter:

a. To railroads and street railroads lying exclusively within that district, and to the persons or corporations owning, leasing or operating the same.

Repealed. 2. And in addition thereto the Commission in the First District shall have and exercise all powers heretofore conferred upon the Board of Rapid Transit Railroad Commissioners under Chapter 4 of the Laws of 1891, entitled "an Act to provide for rapid transit railways in cities of over one million inhabitants," and the Acts amendatory thereof, together with such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon said board by said Act.

This entire subdivision was repealed by Chapter 520 of the Laws of 1919.

By Chapter 134, Laws of 1921, a new section, 5-a, was added, reading as follows:

"§ 5-a. JURISDICTION OF TRANSIT COMMISSION. The jurisdiction, supervision, powers and duties of the transit commission shall extend under this chapter:

"1. To railroads, street railroads and stage or omnibus lines or routes lying exclusively within a city containing a population of over one million inhabitants according to the last preceding federal census or state enumeration; and to the persons or corporations owning, leasing or operating the same;

"2. To street railroads and stage or omnibus lines or routes, any portion of which lies within such city, to all transportation of persons or property thereon within such city or between a point within such city and a point within the state outside the territorial limits of such city, to the persons or corporations owning, leasing or operating the said street railroads or stage or omnibus lines or routes; provided, however, that the public service commission shall have jurisdiction over the operation of the lines of said street railroad or stage or omnibus lines or routes as lies within the state outside the territorial limits of such city, and over the persons or corporations owning, operating or leasing the same, so far as concerns the construction, maintenance, stationary equipment, terminal facilities, stations and local transportation facilities of said street railroads or stage or omnibus lines or routes within the state outside the territorial limits of such city."

§ 22. REHEARING BEFORE COMMISSION. After an order has been made by a commission any corporation or person interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such a rehearing if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted, the same shall be determined by the commission within thirty days after the same shall be finally submitted. An application for such a rehearing shall not excuse any corporation or person from complying with or obeying any order or any requirement of any order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. If, after such rehearing and a consideration of the facts, including those arising since the making of the order, the commission shall be of opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or change the same. An order made after any such rehearing abrogating or

changing the original order shall have the same force and effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order.

ARTICLE 2.

Provisions Relating to Railroads, Street Railroads and Common Carriers.

§ 25. Application of article. The provisions of this article shall apply to the transportation of passengers or property from one point to another within the state of New York, and to any common carrier performing such service.

§ 26. Safe and adequate service; just and reasonable charges. Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this chapter, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter. Every unjust or unreasonable charge made or demanded

for any such service or transportation of passengers or property or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited.

§ 28. TARIFF SCHEDULES; PUBLICATION. Every common carrier shall file with the commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and passengers will be carried, and shall also contain the classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in anywise change, affect or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value

of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for convenient inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of an agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor car or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission and shall conform in the case of railroad corporations as nearly as may be to the form of schedule required by the interstate commerce commission under the act of congress entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven and the acts amendatory thereof and supplementary thereto. Where any similar schedule is required by law to be filed with both commissions they shall agree upon an identical form for such schedule. The commission

shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

§ 29. CHANGES IN SCHEDULE; NOTICE REQUIRED. Unless the commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter, except after thirty days' notice to the commission and publication for thirty days as required by section twenty-eight of this chapter, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly filing and publishing in such manner as it may direct an order specifying the change so made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier.

Public Service Commissions Law—Section 29.

By Chapter 240 of the Laws of 1914 the section was amended by adding thereto at the end the following sentences:

"Whenever there shall be filed with the commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the commission shall have and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation or practice would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation or practice, as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation or practice had become effective. Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after the first day of January, 1914, or of a rate sought to be increased after this section as amended takes effect, the burden of proof to show that the increase in rate or proposed increase in rate is just and reasonable shall be upon the common carrier; and the Commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

By Chapter 134 of the Laws of 1921 the section was further amended by adding a sentence immediately preceding the last sentence added by the Act of 1914, reading as follows: "The commission may as authorized by subdivision one of section forty-nine establish temporary rates for any period of suspension under this section."

The same Act of 1921 changed the last sentence added by the Act of 1914 so as to make the same read as follows: "At any hearing involving a rate the burden of proof to show that the

change in rate if proposed by the common carrier, or that the existing rate, if on motion of the commission or in a complaint filed with the commission it is proposed to reduce the rate, is just and reasonable shall be upon the common carrier; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

§ 33. TRANSPORTATION PROHIBITED UNTIL PUBLICATION OF SCHEDULES; RATES AS FIXED TO BE CHARGED; PASSES PROHIBITED. 1. No common carrier subject to the provision of this chapter shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

ARTICLE 3.

Provisions Relating to the Powers of the Commissions in Respect to Common Carriers, Railroads and Street Railroads.

§ 49. Rates and service to be fixed by the commission. 1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers,

railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed.

As originally enacted by Chapter 429, Laws of 1907, this section gave the commission power to fix and determine just and reasonable rates, fares and charges of any common carrier, railroad corporation or street railroad corporation when it appeared, or was made to appear that such rates were "unjust, unreasonable, unjustly discriminatory or unjustly preferential or in anywise in violation of any provision of law."

In the consolidation of 1910, Chapter 480, Laws of 1910, the section was amended by the insertion of a clause permitting the commission's power of regulation over rates to be exercised where it appeared that "the maximum rates, fares or charges chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable," and "notwithstanding that a higher rate, fare or charge had been heretofore authorized by statute." The same act also added a clause specifying that the commission's determination as to what is a reasonable rate should be made "with due regard, among other things, to a reasonable return upon capital actually expended and to the necessity for making reservation out of income for surplus and contingencies."

By Chapter 546 of the Laws of 1911, the subdivision was amended to read in the form shown above.

There were subsequent amendments in 1921 by Chapter 134 and Chapter 335; in 1922 by Chapter 153, and in 1923 by Chapter 891. As embodied in the 1923 amendment the subdivision is the law as it stands to-day. In the following reprint the body of the text is the subdivision as it was after the second amendment of 1921, the clause added by the 1922 amendment is underlined, the single word added by the 1923 amendment is shown in *italics*, while the matter stricken out by that amendment is shown within [brackets].

"1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its

jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to the estimated prospective earning capacity of such property at the rate of fare at the time fixed and existent and to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher [or lower] rate, fare or charge has been heretofore *authorized* [prescribed] by general or special statute, [contract, grant, franchise condition, consent or other agreement,] and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed [provided, however, anything herein contained to the contrary notwithstanding, that, except in the case of a common carrier other than a street railroad corporation not proposed by the commission to be included in the plan of readjustment under the provisions of article six of this chapter, the transit commission shall not increase or authorize the increase of any rate of fare prescribed by any such general or special statute, contract, grant, franchise, conditions, consent or other agreement except as part of and as may be provided in such plan of readjustment. Any such change in rate, fare or

charge shall be upon such terms, conditions or safeguards as the commission may prescribe.

"If it shall be made to appear to the satisfaction of the commission that the public interest requires a change in the rates, fares or charges demanded or collected by any person, firm or corporation subject to its jurisdiction, or that such change is necessary, for the purpose of providing safe, adequate and efficient service, or for the preservation of the property, the commission, upon such terms, conditions or safeguards as it deems proper, may authorize an immediate reasonable temporary increase or decrease in such rates, fares and charges pending a final determination of the rates, fares and charges to be thereafter observed by such person, firm or corporation, provided, however, anything herein contained to the contrary notwithstanding, the transit commission shall not authorize any such change prior to the adoption of a plan of readjustment under the provisions of article six of this chapter, unless, pending the completion of the valuations of the railroad property which it proposes to include in any such plan and during the preparation of such plan, the commission shall, as the result of its studies and investigations, find such change to be necessary in the public interest for the accomplishment of one or more of the purposes to be achieved by such plan as specified in said article, and in such event the commission shall require as conditions precedent to such change the execution of any such stipulations by the railroad companies and others as in its judgment shall be necessary to further and protect the consummation of such plan. The terms, conditions, or safeguards prescribed may include provisions for the purposes for which the additional revenue derived from any such temporary increase may be expended and for the impounding thereof until the same shall be applied to the purposes so specified.] At any hearing involving a rate, the burden of proof to show that the change in rate if proposed by the common carrier, or that the existing rate,

if or motion of the commission or in a complaint filed with the commission it is proposed to reduce the rate, is just and reasonable shall be upon the common carrier; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

(§49) *2.* Whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier, railroad corporation or street railroad corporation in respect to transportation of persons or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force, to be observed and to be used in such transportation of persons and property and so fix and prescribe the same by order to be served upon every common carrier, railroad corporation and street railroad corporation to be bound thereby; and thereafter it shall be the duty of every common carrier, railroad corporation and street railroad corporation to observe and obey each and every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all of its officers, agents and employees.

4. This subdivision as it existed in 1913 consisted of a single paragraph (which still remains in the law), authorizing the Commission in certain cases to direct through carriage of property in cars over interchange tracks or switch connections between two different carriers. By Chapter 153, Laws of 1922, there was added to this subdivision, three new paragraphs reading as follows:

Public Service Commissions Law—Section 49 (subd. 4).

"In case upon the termination of a lease or otherwise the owner or lessor of a rapid transit railroad resumes operation thereof and thereupon such owner or lessor or the lessee discontinues or threatens to discontinue or refuses or threatens to refuse to permit operation over any extension or extensions of such rapid transit railroad or railroads or any of them, or discontinues or threatens to discontinue or refuses or threatens to refuse to permit operation over other railroads on which such lessee had operated under trackage rights, then and in either of those events the commission may order that through cars for the transportation of passengers shall be operated over such extension or extensions and over the tracks of such other railroad over which such lessee may have had trackage rights, and the commission shall have power, after a hearing, to require by order such operating, including the right to order such switch or other connections or interchange tracks as may be necessary, and if so required, to determine as to the division of the expense of the maintenance and operation thereof. The commission may, after a hearing, prescribe the terms and conditions upon which such operations shall be conducted and the manner in which receipts and expenses shall be apportioned.

"Pending the hearing or hearings provided for herein, and the determinations and orders of the commission thereon, the commission shall have power, if in its judgment the public interest requires it, to issue a temporary order requiring said rapid transit railroad companies to receive from each other, and transport for each other, such cars over each other's tracks by way of switch connection or interchange track, and if no such switch connection or interchange track exists, to construct and maintain said switch connection or interchange track; and upon the completion of said hearing or hearings, and the determinations and orders of the commission thereafter made, the terms of the receipt and transportation of cars, and the readjustment of compensation and expense involved, shall take effect as of the original date of such temporary order of the commission.

"If upon the expiration or earlier termination of a lease, the free transfer or interchange of passengers, theretofore in effect and permitted by the lessee of a rapid transit railroad at any point or points between the lines of the rapid transit railroads owned or leased and operated by it, is discontinued or is threatened to be discontinued, the commission shall have power by order to require the companies, by which the said lines of rapid transit railroads may be operated after the termination of the lease, to continue or re-establish such through routes formerly existing, and to establish joint rates, fares and charges for the transportation of passengers thereon in the manner provided by subdivision three of this section."

(§49) 8. No passenger joint rate, fare, charge, through route or transfer shall be required between any rapid transit railroad and any other rapid transit railroad or any railroad operated as a street surface railroad, nor between a street surface railroad and any railroad operated wholly by steam, or any railroad operated a distance of over fifty miles partly by steam and partly by electricity.

By Chapter 134, Laws of 1921, there was added to the foregoing subdivision as a prefix the words: "Except as may be provided by the Transit Commission."

§ 50. Power of commissions to order repairs or changes. If in the judgment of the commission having jurisdiction, additional tracks, switches, terminals or terminal facilities, stations, motive power, or any other property, construction, apparatus, equipment, facilities or device for use by any common carrier, railroad corporation or street railroad corporation in or in connection with the transportation of passengers or property ought reasonably to be provided, or any repairs or improvements to or changes in any thereof in use ought reasonably to be made, or any additions or changes in construction should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers or property, the commission shall, after a hearing either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every common carrier, railroad corporation and street railroad corporation is

hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it. If any repairs, improvements, changes or additions which the commission has determined to order require joint action by two or more of said corporations, the commission shall, before entry and service of order, notify the said corporations that such repairs, improvements, changes or additions will be required and that the same shall be made at their joint cost, and thereupon the said corporations shall have thirty days or such longer time as the commission may grant within which to agree upon the part or division of cost of such repairs, improvements, changes or additions which each shall bear. If at the expiration of such time such corporations shall fail to file with the commission a statement that an agreement has been made for a division or apportionment of such repairs, improvements, changes or additions the commission shall have authority, after further hearing, to fix in its order the proportion of such cost or expense to be borne by each corporation and the manner in which the same shall be paid and secured. But this section shall not be construed to authorize the commission to require two or more railroad corporations to unite in the erection of a union station.

§ 51. Power of commissions to order changes in time schedules; running of additional cars and trains. If, in the judgment of the commission having jurisdiction, any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, trans-

ported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall, after a hearing either on its own motion or after complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

§ 55. Approval of issues of stock, bonds and other forms of indebtedness. A common carrier, railroad corporation or street railroad corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of

an application with the proper commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that except as otherwise permitted in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income; but this provision shall not apply to any lawful issue of stock, to the lawful execution and delivery of any mortgage or to the lawful issue of bonds thereunder, which shall have been duly approved by the board of railroad commissioners before July first, nineteen hundred and seven. * * *

The remainder of the section relates to administrative details and specifies certain exceptions as to indebtedness incurred for a period less than twelve months where commission approval is unnecessary; also limitations upon the aggregate amount of the security issues approved with relation to the capital actually paid in.

§ 56. FORFEITURE; PENALTIES. 1. Every common carrier, railroad corporation and street railroad corporation and all officers, and agents of any common carrier, railroad corporation or street railroad corporation shall obey, observe and comply with every order made by the commission, under authority of this chapter so long as the same shall be and remain in force. Any common carrier, railroad corporation or street railroad corporation which shall violate any provision of this chapter, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York not to exceed the sum of five thousand dollars for each and every offense; every violation of any such order or direction or requirement, or of this chapter, shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be and be deemed to be a separate and distinct offense.

2. Every officer and agent of any such common carrier or corporation who shall violate, or who procures, aids or abets any violation by any such common carrier or corporation of any provision of this chapter, or who shall fail to obey, observe and comply with any order of the commission or any provision of an order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor.

§ 57. SUMMARY PROCEEDINGS. Whenever either commission shall be of opinion that a common carrier, rail-

road corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue

as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

ARTICLE 4.

Provisions Relating to Gas and Electrical Corporations; Regulation of Price of Gas and Electricity.

§ 66. General powers of commission in respect to gas and electricity. Each commission shall * * *:

12. Have power to require every gas corporation, electrical corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation or municipality; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, an electrical corporation or municipality in compliance with an order of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which

shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation or municipality refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations to carry into effect the provisions of this subdivision as it may deem necessary, and to modify or amend such rules or regulations from time to time.[1] Nothing in this chapter shall be taken to prohibit a gas corporation from establishing a sliding scale upward rate, for natural gas, beginning at a fixed price per unit for a small consumption and then increasing the price per unit as the consumption is increased.[2] Whenever there shall be filed with the commission by any gas corporation, electrical corporation or municipality, as defined in this chapter, any schedule stating a new rate

or charge, or any change in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, the commission shall have and it is hereby given authority, at any time within sixty days from the date when such schedule would or has become effective, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or other formal pleading by the interested corporation, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, schedule, form of contract or agreement, or rule or regulation relating to any rate, charge or service, or any general privilege or facility; and pending such hearing and decision thereon, the commission, upon filing with such schedule and delivering to the corporation affected thereby, a statement in writing of its reasons therefor, may suspend the operation of such schedule and defer the operations of such rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility goes into effect, the Commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility as would be proper in a proceeding begun after the rate, charge, form of contract or agreement, rule, regulation, service, gen-

eral privilege or facility had become effective. Provided that, if any such hearing cannot be concluded within the period of suspension as above stated, the commission may in its discretion extend the time of suspension for a further period, not exceeding six months. The commission may, as authorized by section seventy-two, establish temporary rates or charges for any period of suspension under this section. At any hearing involving a rate, the burden of proof to show that the change or proposed change if proposed by the corporation, or that the existing rate, if on motion of the commission, or in a complaint filed with the commission, it is proposed to reduce the rate, is just and reasonable shall be upon the corporation; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. The schedule, rates, charges, form of contract or agreement, rule, regulation, service, general privilege or facility in force when the new schedule, rate, charge, form of contract, rule, regulation, service, general privilege or facility was filed shall continue in force during the period of the suspension provided for in this section unless the commission shall establish a temporary rate or charge as authorized by section seventy-two of this chapter.

The first part of Section 12, down to [1], was originally enacted by Chapter 480 of the Laws of 1910.

The sentence between [1] and [2] of this subdivision was inserted by Chapter 542 of the Laws of 1920.

The balance of the section after [2] was inserted by the Laws of 1921, Chapter 134.

ARTICLE 4-A.

Provisions Relating to Steam Corporations; Regulating Price of Steam.

Added by Laws of 1913, Chapter 505.

§ 80. General powers of commission in respect to steam heating. Each commission shall * * *:

10. Have power to require every steam corporation, person or municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such steam corporation, person or municipality; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed or published by a steam corporation, person or municipality in compliance with an order of the commission, except after thirty days' notice to the commission and the publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requir-

ing the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation, person or municipality refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations to carry into effect the provisions of this subdivision as it may deem necessary, and to modify or amend such rules or regulations from time to time.] Whenever there shall be filed with the commission by any steam corporation, person or municipality as defined in this chapter any schedule stating a new rate or charge, or any change in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, the commission shall have and it is hereby given authority at any time within sixty days from the date when such schedule would or has become effective, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or other formal pleading by the inter-

ested corporations, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, schedule, form of contract or agreement, or rule or regulation relating to any rate, charge or service or any general privilege or facility; and, pending such hearing and decision thereon the commission, upon filing with such schedule and delivering to the corporation affected thereby, a statement in writing of its reasons therefor, may suspend the operation of such schedule and defer the operation of such rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility as would be proper in a proceeding begun after the rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility had become effective. Provided that if any such hearing cannot be concluded within the period of suspension as above stated, the commission may in its discretion extend the time of suspension for a further period not exceeding six months. The commission may, as authorized by section eighty-five, establish temporary rates or charges for any period of suspension under this section. At any hearing involving a rate or charge, the burden of proof to show that the

change in rate or charge, or proposed change in rate or charge if proposed by the person, corporation or municipality operating the utility, or that the existing rate or charge, if on motion of the commission or in a complaint filed with the commission it is proposed to reduce the rate or charge, is just and reasonable shall be upon the person, corporation or municipality operating such utility; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. The schedule, rates, charges, form of contract or agreement, rule, regulation, service, general privilege or facility in force when the new schedule, rate, charge, form of contract, rule, regulation, service, general privilege or facility was filed shall continue in force during the period of the suspension provided for in this section unless the commission shall establish a temporary rate or charge as authorized by section eighty-five of this chapter.

The first part of subdivision 10 down to [1] was originally enacted by Chapter 505 of the Laws of 1913. (Effective May 14th, 1913.)

The remainder of the section after [1] was added by Chapter 134 of the Laws of 1921.

ARTICLE 7

Commissions and Offices Abolished; Saving Clause; Repeal.

(§ 127) § 87. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed. All other acts and parts

of acts otherwise in conflict with this act are hereby repealed.

SCHEDULE OF LAWS REPEALED

Laws of	Chapter	Section
1890	565	38, 104, 150-172
1890	566	62-64
1891	4	1-3
1892	534	All
1892	676	Part amending L. 1890, Ch. 565, §§ 105, 162
1893	385	All
1894	452	All
1894	752	1-3
1895	972	All
1896	456	All
1897	486	All
1898	364	All
1899	732	All
1901	639	All
1902	373	All
1904	158	All
1905	728	All
1905	737	All
1907	429	All

The section in its present form was enacted as Section 87 of Chapter 480 of the Laws of 1910. By Chapter 673 of the Laws of 1910 said Section 87 was renumbered Section 127.

ARTICLE VIII.

Board of Transportation.

Article VIII added by Laws of 1924, Chapter 573.

§ 135. Municipal operation; rates of fare. If the board of transportation shall undertake or engage in public or municipal operation of any road or roads pursuant to the authority of the rapid transit act the rate of fare shall be five cents for an initial period not to exceed three years from the date of beginning such operation. If the aggregate revenues derived from the municipal operation of such road or roads during the third year of the initial period be insufficient to pay (a) operating expenses exclusive of maintenance; (b) expenses of maintenance and repairs of structures and equipment, exclusive of depreciation; (c) contributions to a depreciation fund or funds, for replacement or renewal of worn out, obsolete or inadequate units of structure or equipment; (d) the amount of interest actually payable by such city on debt incurred or obligations issued on account of such rapid transit railroad or railroads so operated and (e) contributions to sinking fund to amortize and retire the debt incurred or obligations issued by said city on account of such rapid transit railroad or railroads, the board of transportation shall within sixty days adjust, fix and readjust the rate of fare on such road or roads, so as to produce an annual income sufficient to make all such payments.

Rapid Transit Act of the State of New York.

LAWS OF 1891, CHAPTER 4.

AN ACT TO PROVIDE FOR RAPID TRANSIT RAILWAYS IN CITIES OF OVER ONE MILLION INHABITANTS.

Pertinent sections shown are as of March 19, 1913, the time of making Contract No 3 (except as otherwise indicated), together with notes showing, where material, original enactment of section and amendments, if any, up to March 19, 1913.

Section 4. PUBLIC SERVICE COMMISSION TO DETERMINE NECESSITY FOR RAILROADS; ROUTES, PLAN; CONSENTS; PARKS AND STREETS EXCEPTED.

1. The public service commission of the first district upon its own motion may proceed, from time to time, to consider and determine whether it is for the interest of the public and of a city having over one million inhabitants, according to the last preceding national or state census, that a rapid transit railroad or railroads for the conveyance and transportation of persons and property should be established therein, and upon the request in writing of the local authorities of any such city at any time, the said commission shall proceed forthwith to consider and determine the same questions, and in each case the said commission shall conduct such an inquest and investigation as may be deemed necessary in the premises. If, after any such consideration and inquest, the said commission shall determine that

a rapid transit railroad or railroads, in addition to any already existing, authorized or proposed, are necessary for the interest of the public, and such city, it shall proceed to determine and establish the route or routes thereof and the general plan of construction. Such general plan shall show the general mode of operation and contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected. The commission, from time to time, may locate the route or routes of such railroad or railroads over, under, upon, through and across any streets, avenues, bridges, viaducts, rivers, waters and lands within such city, including blocks between streets or avenues, or partly over, under, upon, through and across any streets, avenues, bridges, viaducts, and lands within such city and partly through blocks between streets or avenues; provided that the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having control of that portion of a street, bridge, viaduct, or highway, upon which it is proposed to construct or operate such railroad or railroads be first obtained, or in case the consent of such property owners can not be obtained, that the determination of three commissioners appointed by the appellate division of the supreme court in the department of the proposed construction, given after due hearing of all parties interested, and confirmed by the court, that such railroad or railroads ought to be constructed or operated, be taken in lieu of the consent of such property owners; * * *

Rapid Transit Act—Section 5 (subd. 1).

The omitted balance of subdivision 1 specifies certain streets in Manhattan, Brooklyn and Buffalo from which rapid transit railroads are excluded, or in which they were permitted.

Section 5. APPROVAL AND CONSENT OF BOARD OF ESTIMATE AND APPORTIONMENT, OR OTHER BOARD; CONSENT OF LOCAL AUTHORITIES.

1. After any determination by the public service commission of any such route or routes and of any general plan of construction of said railroad or railroads, the commission shall transmit to the board of estimate and apportionment or other board or boards of said city having the control of any street, highway, boulevard, driveway, bridge, tunnel, park, parkway, dock, bulkhead, wharf, pier or public grounds or water which is within or belongs to the city, a copy of said plans and conclusions as adopted. It shall be the duty of such board of estimate and apportionment and of every other such board or boards having such control, upon receiving such copy of plans and conclusions, to appoint a day not less than one week nor more than ten days after the receipt thereof for the consideration of such plans and conclusions, and the said board of estimate and apportionment and every other such board or boards having such control shall, on the day so fixed, proceed with the consideration thereof and may continue and adjourn such consideration, from time to time, until a final vote shall be taken thereon, as hereinafter provided. Within sixty days after the copy of such plans and conclusions adopted by the commission shall have first been received by said board of estimate and apportionment or such other board or boards having such control, a final vote shall be taken thereon, by ayes and

nays, according to the number of votes by law pertaining to each member of any such board in the form of a vote upon a resolution to approve such plans and conclusions and to consent to the construction of a railroad or railroads in accordance therewith.

2. Upon the adoption of such a resolution by a majority vote of all the members of said board of estimate and apportionment, or other such board or boards having such control, according to the number of votes by law pertaining to each member of any such board and the approval of the mayor, the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consent shall be deemed to be the consent of the local authorities of such city; provided, that where in any such city the exclusive control of any street, road, bridge, viaduct, highway or avenue which is to be used or occupied by any railroad or railroads constructed under the provisions of this act, is by law vested in any local authority other than the board of estimate and apportionment of such city, the approval of the aforesaid plans and conclusions and the consent to the construction of a railroad thereunder shall be given by such local authority in place of and, if required, in addition to such approval and consent by said board of estimate and apportionment and with like effect.

5. The board of estimate and apportionment of the city of New York shall, with respect to that city, be hereafter for all purposes of this act and be deemed to be the local authority in control of the streets, roads, bridges, viaducts, highways, avenues, boulevards, driveways,

parks, parkways, docks, bulkheads, wharfs, piers and public grounds and waters which are within or belong to the said city; and the consent of such board of estimate and apportionment and the mayor, without the consent of the common council, board of aldermen or other board or officer of the city, shall be the only consent of local authorities required hereunder.

Section 6. DETAIL PLANS; TUNNEL FOR PIPES AND WIRES; WORK AFFECTING SEWERS AND OTHER SUB-SURFACE STRUCTURES.

1. When the consents of the local authorities and property owners, or, in lieu thereof, the authorization of the appellate division of the supreme court upon the report of commissioners, shall have been obtained, the public service commission shall at once proceed to prepare detailed plans and specifications for the construction of such rapid transit railroad or railroads in accordance with the general plan of construction, including all devices and appurtenances deemed by it necessary to secure the greatest efficiency, public convenience and safety, including the number, location and description of stations and plans and specifications for the suitable supports, turnouts, switches, sidings, connections, landing places, buildings, platforms, stairways, elevators, telegraph and signal devices, and other suitable appliances incidental and requisite to what the commission may approve as the best and most efficient system of rapid transit in view of the public needs and requirements, including in its discretion operation of such railroad or railroads or some portion thereof by any device or means, other than separate cars or trains, in the construction of which station-

ary means for guiding a conveyance in a definite path and means for propelling such conveyance are necessary elements, and the commission may, in its discretion, include in said plans provisions for galleries, ways, subways or tunnels for sewers, gas or water pipes, electric wires and other sub-surface structures and conductors proper to be placed underground, whenever necessary so to do, in order to permit of the proper construction of any railroad herein provided for in accordance with the plans and specifications of the board of rapid transit railroad commissioners or of the commission, or for any other purpose in furtherance of the public interest or convenience.

2. Stations and station approaches may be under or over streets of the route or cross streets, and the board of aldermen, or other legislative body, of any such city shall have power to regulate by general or special ordinance or resolution, the erection, alteration and maintenance upon or in connection with any building used, wholly or in part, for station purposes, or approaches or any and all structures or parts of structures extending over the whole or any part of any sidewalk or sidewalks adjacent thereto. The commission may, from time to time, alter such detail plans and specifications, but always so that the same shall accord with the general plan of construction; but whenever a contract shall have been made for the construction of any railroad herein provided for, no such alteration shall be made by the commission without the consent of the contractor and his sureties, except as liberty shall have been reserved in such contract by said board of rapid transit railroad commissioners or by the commission for such alteration.

Rapid Transit Act—Sections 7 and 22 (subd. 1).

REPEALED [§7. If, after having secured the necessary consents and after having prepared such detailed plans and specifications as are by this act provided for, it shall not have been determined by a vote of the people as provided by sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four that such railway or railways shall be constructed for and at the expense of such city as hereafter provided, said board shall sell at public auction in the city where said railway or railways are to be built and for the account and benefit of said city the right, privilege and franchise to construct, maintain and operate such railway or railways. * * * But the rate of fare for any passenger on said railway from any point on the same northward or southward within the City of New York shall not exceed five cents under any provision of this act. * * *]

Section 7. This section of the Act of 1891 provided for the sale at public auction of franchises for terms, corporate character of bidder, bids, resales, etc.

The first amendment to this section in Chapter 752 of the Laws of 1894 contained a reference at an election to the people of the city to determine by vote whether the railway shall be constructed for and at the expense of the city, and a provision fixing any fare chargeable under the Act within the city to not exceeding five cents.

The section was repealed by Chapter 498, Laws of 1909.

Section 22. PRIVATE CONSTRUCTION; FRANCHISE TO CONSTRUCT, MAINTAIN AND OPERATE.

1. If or when the necessary consents have been obtained and the detailed plans and specifications have been prepared, either by the board of rapid transit railroad commissioners or by the commission, for the said rapid transit railroad, the commission may with the approval

of the board of estimate and apportionment or other analogous authority of such city, grant a franchise to construct, maintain and operate such railroad for the transportation of passengers and property for compensation. The commission shall have power to prescribe all such terms and conditions of such grant and to require such security to be given and filed for the keeping and performance of such terms and conditions as it may deem to be for the interest of the public and of the city and may provide that in connection with the construction of such railroad by the grantee at its own expense any galleries, ways, subways or tunnels for sub-surface structures which may be included in any such plans shall be also constructed by the grantee at the public expense, and in such case the sum or sums to be paid therefor shall be separately stated and the amount appropriated and paid out of the funds hereafter authorized to be provided in case of such construction, and the commission may provide separately for the maintenance, supervision, care and operation of the same as hereinafter authorized under the provisions of section twenty-seven.

6. Any existing railroad corporation owning or actually operating a railroad wholly or in part within the limits of the city and approved by the said commission shall be competent and is hereby authorized to bid for and receive any grant pursuant to the provisions of this section. If the successful bidder or bidders be not a corporation, then a corporation may be organized under the railroad law by him or them for the purpose of receiving such grant and of constructing, equipping, maintaining and operating a railroad pursuant to the terms of any such certificate and a corporation so organized shall not

be required to procure the certificate or approval of the public service commission as provided for in section fifty-nine of the railroad law or section fifty-three of the public service commissions law.

Section 24. CONNECTIONS WITH OTHER RAILROADS, STATIONS AND FERRIES.

Changes made by amendments contained in Chapter 226 of the Laws of 1912 are shown in italics.

1. The public service commission may also from time to time, with the approval of the board of estimate and apportionment, upon application of any person, firm or corporation owning, leasing, constructing or actually operating *or having the right by contract to thereafter operate* a railroad wholly or in part within the limits of the city in which the commission has power to act, if in the judgment of said commission, the public interests so demand, fix and determine the route or routes by which any such person, firm or corporation may connect with other railroads, or the stations thereof, or with ferries *or bridges*, or may extend his or its lines *or lines which he or it operates or has the right to operate as aforesaid* within said city, *or upon the application of a corporation organized under the railroad law for any of the purposes specified in subdivision nine of section twenty-seven of this act, and agreeing to equip, maintain and operate or to procure to be equipped, maintained and operated any road or roads of the city in connection with any existing railroad of a railroad corporation and any extension or extensions thereof wholly within such city, on the basis of a division of income, earnings or profits as hereinafter provided, the commission may*

with like approval, if in the judgment of the commission the public interests so demand, fix and determine the route or routes by which such corporation may construct, maintain and operate such extension or extensions, and may, with like approval, authorize such corporation to construct, maintain and operate such extensions, and may with like approval authorize any such person, firm or corporation to lay an additional track or tracks on, above, under or contiguous to a portion or the whole of the route or routes of his or its railroad or railroads within said city and to acquire terminal or other facilities necessary for the accommodation of the traveling public on any street or place except the place known as Battery park on which said railroad shall be located; and may also with like approval authorize any such person, firm or corporation to lay his or its tracks and operate his or its railroad to any terminal or terminals within the said city, and to transport over the same passengers or freight or both, and to run over the same either passenger trains or freight trains or mixed trains; and the commission shall with like approval fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, and such other terms, conditions and requirements as to the said boards may appear just and proper, provided, however, that every such determination, authorization and license shall be made upon the condition that such person, firm or corporation shall from the time of the commencement of the operation of any such railroad or track or tracks under such determination, authorization

or license, annually pay to the said city a sum or rental *which may be a part or proportion of gross or net receipts*, and that the amount of such sum or rental for a period of not more than twenty-five years, beginning with such operation of any such railroad, track or tracks, shall be prescribed by the commission in such determination, authorization and license, and that every such determination, authorization and license shall provide for the readjustment of the amount of such sum or rental at the expiration of the period for which the same shall be so prescribed and for readjustment from time to time in the future, to the end of the period of renewal, if any, of the amount of such annual payment at intervals each of not more than twenty years; *provided further, however, that such determination, authorization or license may provide that for the whole or any portion of the life of the grant in lieu of such annual rental the gross or net receipts derived from the operation of such railroad owned, operated or to be operated by the said person, firm or corporation within the limits of said city, and from the operation of such connecting or extending route or routes, additional track or tracks or facilities may be combined, and that the city may receive as such compensation at intervals named a specified part or proportion of the income, earnings or profits of the railroad, and the route or routes, additional track or tracks or facilities whose receipts are so combined or of those and any other railroads which may be operated in connection therewith in like manner, which part or proportion may be deferred to a previous distribution to said person, firm or corporation, which distribution may be cumulative, and in such case such determination, au-*

thorization or license may apportion out of the amount so to be received by the city and shall specify a portion thereof which shall be deemed to be the rental for the use of such route or routes, additional track or tracks or facilities, and shall also provide for determining the amount of the income, earnings or profits of the railroad within the limits of the city and of the route or routes, additional track or tracks or facilities whose receipts are so combined and may provide for readjustment of the proportion which the city shall receive or of the portion thereof which shall be deemed to be the rental for the use of said route or routes, additional track or tracks or facilities as specified intervals, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its proportion of such income, earnings or profits or as such rental upon any such readjustment thereof. Such determination, authorization or license shall contain a reservation to the city of the privilege, upon giving a specified notice, to terminate the franchise, right or authority granted under this section *as to all, and if deemed advisable as to any specified portion or portions of such route or routes, additional track or tracks or facilities,* and to purchase and take the plant and property as defined in the grant at any time after the expiration of ten years from the date when operation of any part *of said route or routes, additional track or tracks or facilities or of such specified portion* thereof shall actually begin, upon paying an amount for said plant and property as property, excluding any value for the franchise, right or authority, which amount shall not exceed actual cost *as defined in the grant* of said plant and property plus

fifteen per cent. thereof and shall decrease under provisions of the grant as the franchise continues, so that at the end of the full term of the grant or at the end of a period specified therein, no amount shall be paid except for *betterments, additions, improvements and additional* equipment as hereinafter provided. The grant shall provide a method of ascertaining the amount to be paid for said plant and property on termination by the city of the said franchise, right or authority and for the *betterments, additions, improvements and additional* equipment at the end of the full term of the grant, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of such plant and property or any part or portion thereof for any purpose under such grant. Such determination, authorization or license may also make suitable provision to the end that if the city shall after so terminating such franchise, right or authority or at the end of the full term of the grant propose to give a new franchise, right or authority in the enjoyment of which said plant and property or any part thereof may be utilized, the title to and possession of said plant and property or any part thereof may be transferred directly to the grantee of any such new franchise, right or authority when the said new grantee shall pay the amount so required; *provided, however, that in the case of additional track or tracks added to any existing elevated rapid transit railroad, the determination, authorization or license may provide that said privilege of the city to terminate the franchise, right or authority therefor and to purchase and take the plant and property shall not be for railroad transit operation either by the*

city or by any other party, and shall be without prejudice to the rights of the said person, firm or corporation in the lines of said existing elevated railroad, and may make adequate provision for the protection of such rights. The commission may with like approval authorize the relocation of any existing tracks, structures, stations and appurtenances of such person, firm or corporation in any street or avenue in which the same now exist, such relocated structure to be held under all the terms and privileges of the original franchise.

2. A certificate shall be prepared by the commission, attested by its seal and the signature of its presiding officer, setting forth in detail the action taken by the commission with respect to such connecting or extended route or routes and such tracks and facilities, and the terms, conditions and requirements aforesaid, including provisions as to the said annual payments and the future readjustments thereof. A like certificate shall be prepared in like manner upon every modification of the terms of the contract as hereinafter provided. Every such certificate shall prescribe the terms and conditions of the readjustments of such annual payments and may provide for the determination of such amount upon such readjustments by arbitration or by the supreme court. Such certificate shall be delivered to said person, firm or corporation upon the receipt by said commission of a written acceptance of said terms, conditions and requirements, duly executed by said person, firm or corporation, so as to entitle it to be recorded.

3. The said certificates shall be filed in the office of the secretary of state, and a duly certified copy thereof

shall be filed in the office of the clerk of each county to which the said privileges granted hereunder pertain, and thereupon, and upon fulfillment, by such person, firm or corporation, so far as it relates to such connections, additional track or tracks, or facilities, of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the constitution of this state, and upon fulfillment by such person, firm or corporation of such other terms, conditions and requirements enumerated in said certificate, as the commission may require to be fulfilled as a condition precedent to commencing said work, said person, firm or corporation shall in such cases possess in addition to existing franchises all the powers conferred by this act upon corporations with respect to his or its railroads authorized to be constructed as aforesaid, and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, such person, firm or corporation may construct the same with all the rights, and with like effect as though the same had been a part of the original route of his or its railroad then in actual operation or in process of construction, except that no franchise, right or authority shall be granted under this section to extend any railroad, make any connections, lay any additional track or tracks or acquire any terminal or other facilities for a longer period than the unexpired term of the original grant, franchise or contract of the railroad and any renewal thereof contained in such contract to which such extension, connection, additional track or tracks, or terminal or other facilities are added,

and that any such franchise, right or authority granted hereunder shall also be subject to be terminated by the city in like manner and under the same terms and conditions and at the same time or times as may be provided in such original grant for the termination or taking by the city of that grant if provision therefor be made.

4. The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such person, firm or corporation shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of said certificate; and such contract shall be enforceable by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time with the consent of such person, firm or corporation, be modified by the commission. In the case of any grant under this section for the extension of any railroad or the making of any connections, or the laying of any additional track or tracks, or the acquisition of any terminal or other facilities under the provisions of this section, the commission may make provision as a condition of the said grant for the termination by the city of the original grant or franchise or contract, for the railroad to which such extension, connection, additional track or tracks or terminal or other facilities are to be added and for the taking over at the same time of the plant and property of the grantee or holder of said original franchise or contract suitable to and used for the purpose of such original grant or contract in connection with the termination of the franchise, right or

authority granted under this section, upon giving a specified notice and paying an amount for said plant and property as property, excluding any value for the original franchise or contract, which amount shall not exceed actual cost of said plant and property plus fifteen per cent. thereof and shall decrease under the provisions of the grant made hereunder as the franchise or contract continues, so that at the end of the grant or contract no amount shall be paid except for equipment as defined in the grant. The grant shall provide a method of ascertaining the amount to be paid for such plant and property on termination by the city of the said original franchise or contract or for equipment at the end of the full term thereof, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of such plant and property or any part or portion thereof for any purpose under said grant. The grant in such case may also make suitable provision to the end that if the city shall after so terminating such original grant or franchise or at the end of the full term thereof propose to grant a new franchise, right or authority in the enjoyment of which said plant and property or any part thereof may be utilized, the title to and possession of the said plant and property or any part thereof may be transferred directly to the grantee of any such new franchise.

5. But the construction and operation of such connections, extensions, additional track or tracks or facilities are hereby authorized only upon condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street

or highway upon, above or under which it is proposed to construct or operate the same, be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court in the department in which they are proposed to be constructed, may, upon application, in the same manner, and on the same notice specified in section five of this act, appoint three commissioners who shall determine after a hearing of all the parties interested whether the same ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

Subdivisions 1 through 5 above were formerly known as Section 32a. They were subdivided and renumbered as above by Laws of 1909, Chapter 498.

The passage on pages 167-168, indicated by black marginal line originated in Laws of 1906, Chapter 600, and has since remained unchanged. 1891 See 32.

6. Every such certificate granting any franchise, right or authority, as aforesaid, except for additional track or tracks added to any existing elevated rapid transit railroad shall provide that upon the expiration of a period fixed therein the franchise shall end and that upon such termination thereof all the rights of property of the grantee in the streets, avenues, parkways, highways and public places shall cease and terminate without compensation and shall further provide that upon such expiration of such franchise, right or authority the plant and property together with the appurtenances thereto, of the grantee, constructed pursuant to such certificate, except betterments, additions, improvements and additional equipment as defined in the grant, shall become the property of the city without further or other con-

pensation to the grantee; and that such betterments, additions, improvements and additional equipment shall be and become the property of the city on paying the grantee the amount ascertained as provided pursuant to said certificate. The provisions of this section shall apply to any railroad or railroads constructed, constructing or contracted for under the provisions of section twenty-six of this act and to any person, firm or corporation constructing or operating such railroad or railroads.

Section *27*. CONTRACT FOR EQUIPMENT, MAINTENANCE AND OPERATION.

Changes made by amendments contained in Chapter 226 of the Laws of 1912 are shown in italics.

1. The public service commission shall, subject to the approval of the board of estimate and apportionment, or other analogous local authority of such city, have full power and authority to provide for the maintenance, supervision, care and operation of the railroad or railroads and also of the aforesaid galleries, ways, subways and tunnels for subsurface structures and all other appurtenances, constructed or to be constructed for and at the expense of such city pursuant to the provisions of this chapter, and may, with like approval, enter into a contract with any person, firm or corporation, who or which in the opinion of said commission shall be best qualified to fulfill and carry out said contract, for the equipment, or any part thereof not provided for pursuant to the next preceding section of this act, of such road or roads, at his or its own cost and expense, and for the maintenance and operation of such road or roads for a term of years to be specified in said contract and not to exceed

twenty years, or in lieu of such definite term *of twenty years* the contract may *be for a longer period to be fixed by the contract and in such case it shall* provide that the city upon giving a specified notice shall have the right to terminate the contract for the equipment, maintenance and operation of such road or roads *as to all and if deemed advisable as to any specified portion or portions thereof* at any time after the expiration of ten years from the date when operation of any part of such road or roads *or of such specified portion thereof* shall actually begin, but such right of termination shall be upon condition as follows:

(1.) *If the title to the equipment of said railroad or railroads shall not be vested in the city then* that the equipment of said railroad or railroads *or portion thereof* suitable to and used for purposes of such contract shall be purchased and taken by the city at an amount which shall be ascertained as provided in the contract, but which shall not be greater than the actual cost of same plus fifteen per cent. thereof and such equipment shall upon such termination of such contract become and be the property of the city on paying to the contractor such amount, *or in case the title to the equipment of said railroad or railroads shall be vested in the city then that the city shall pay to the contractor an amount for his investment in the equipment of said railroad or railroads, or portion thereof, which shall not exceed the actual cost to the contractor of the equipment of said railroad or railroads or portion thereof, plus fifteen per cent. thereof, and shall decrease under the provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall*

be paid except that if additional equipment shall be required and supplied after the railroad, or portion thereof, shall have been put in operation, and if the contract shall provide that title to such additional equipment shall vest in the city when supplied, then the city shall pay an amount for the contractor's investment in such additional equipment which amount shall not exceed the actual cost to the contractor of such additional equipment plus fifteen per centum thereof and shall diminish so that at the end of the full term of the contract the city shall be required to pay for such investment in additional equipment only such amount as shall be provided in such contract, and

(2.) Upon the further condition if said railroad shall be constructed wholly or in part at the cost of the contractor that the city shall also pay to the contractor an amount for his investment in the construction of said road *or portion thereof* which shall not exceed the actual cost to the contractor of constructing said road *or portion*, plus fifteen per cent. thereof, and shall decrease under provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid, *except that if betterments, additions or improvements shall be required by the commission or approved by the commission prior to the construction thereof and be constructed wholly or in part at the cost of the contractor, then that the city shall pay an amount for the contractor's investment in such betterments, additions or improvements which shall not exceed the actual cost to the contractor of constructing such betterments, additions or improvements plus fifteen per cent. thereof and which amount shall diminish so*

that at the end of the full term of the contract the city shall be required to pay for such investment in betterments, additions or improvements only such amount as shall be provided in the contract.

The contract shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's said investment in the construction of said road upon termination by the city of any such contract and for the equipment of such railroad at the end of the full term of the contract, and the contract may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of the contractor's said investment in the construction of said road and of the equipment or any part or portion of either thereof for any purpose under said contract. *The contract may provide that the title to the equipment as well as to said road, shall vest in the city from the beginning and that the amount to be paid by the city for the contractor's investment in such equipment shall decrease as the term of the contract continues, so that at the end of the full term of the contract no amount shall be payable therefor except for additional equipment as aforesaid.*

The contract shall provide that upon the expiration of a period fixed in the contract, the term of said contract shall end without compensation to the contractor except *as provided in the contract, for betterments, additions or improvements to any such railroads required to be made or approved by the commission prior to the construction thereof during the term of any such contract, and if the title to the equipment be not vested in the city,* for equipment suitable to and *used* for the purposes of

said contract *to the amount if any ascertained as provided in the contract,* and that *in such event* said equipment shall become the property of the city upon payment to the contractor of the *said* amount *or, if the title to the equipment be vested in the city, then an amount for the contractor's investment in additional equipment for any such railroads to be ascertained as provided in the contract. The contract may also provide that the city in exercising the right so to terminate any contract shall for such compensation as may be reasonable and which shall be determined pursuant to the contract permit the contractor whose contract is so terminated or the assignee or lessor of the contractor to use the tracks, structure and line equipment of a portion of such road or roads when necessary or convenient to reach terminals, yards or other facilities of the contractor or such assignee or lessor then located thereon.* The contract may also provide for assuring that in case a new contract under this section for equipment and for maintenance and operation of such railroad or railroads is made after such termination pursuant to notice or after the expiration of the full term of the contract that the title to and possession of the equipment so taken and the right to the possession of the railroad so constructed may be transferred directly to the new contractor upon his paying the amount so required.

2. If such contract be made with a railroad corporation organized for the purpose of maintaining and operating a railroad, including the equipment or any part thereof, constructed pursuant to the provisions of this chapter, and which has entered into a contract or contracts for the maintenance and operation of a railroad or railroads theretofore constructed in whole or in part at the expense

of the city as in this act provided, and is engaged in the maintenance and operation of the same within such city, and if such contract shall make provision for the equipment, maintenance and operation of such road or roads of the city in connection with the said railroad or railroads theretofore constructed as aforesaid at the expense of the city, and for a single fare, the said corporation and the city may in such contract or by modification of an existing contract or contracts provide that the original term of any contract for operation of the said railroad or railroads theretofore constructed in whole or in part at the expense of the city, may be extended or reduced and any right to a renewal or renewals thereof may be abrogated or waived, so that such term as extended or reduced shall become and be coterminous with the term for equipment, maintenance and operation of such road or roads of the city to be fixed in and by such contract, and that if the city shall elect to terminate the contract for equipment, maintenance and operation of such road or roads as to any line or portion thereof which with a connecting line or portion of the said railroad theretofore constructed and then operated by such corporation shall make a continuous line, then the city may when so terminating such contract as to any such line or portion thereof, take over the said connecting line or portion thereof theretofore constructed in whole or in part at the public expense and then operated by the said railroad corporation and terminate the contract of such corporation as to the same, provided that in lieu of such connecting line or portion thereof so taken over the said corporation shall for the then unexpired term of the contract for operation of the railroad theretofore constructed have the right to maintain

and operate without right of recaption by the city another line of road or portion thereof specified in such contract which with the said lines of the railroad theretofore constructed shall make a continuous line, and the contract shall in such case provide for adjustment between the city and the corporation of the difference in the value of the right to operate the lines or portions thereof so exchanged by agreement or arbitration or by the court and for payment of such difference between them. The city and the corporation may also in such contract provide that if the city shall under any provision of law terminate the contract for the maintenance and operation of the said road or roads of the city after the expiration of ten years from the date when operation of any part of such road or roads shall actually begin, the city may at any time after thirty-five years from said date terminate the said contract or contracts for the maintenance and operation of the railroad or railroads theretofore constructed at the public expense, and take over such railroads upon payment to said company of a sum not exceeding the then present worth of the unexpired portion of the term of said contracts to be ascertained as provided in such contract, which may provide that in default of agreement such sum may be determined by arbitration or by the court.

The contract between the city and such corporation may also provide that in consideration of the operation of the railroads specified as provided for in such contract and the said railroad or railroads theretofore constructed in whole or in part at public expense in connection with each other for a single fare, and of the payment by said company of moneys to be applied as hereinafter authorized to or toward the construction by the city of the road

or roads to be maintained and operated under such contract, and in further consideration of any covenants or agreements by the company to modify the term or terms of its leases or to waive or modify any of the other provisions of its contract or contracts, the gross receipts of the operation of such railroads theretofore constructed and of such road or roads of the city to be maintained and operated under such contract may be combined during the term of such contract, and that the city shall receive for the use of its said additional road or roads at intervals named a specified part or proportion of the income, earnings or profits of the railroads whose receipts are so combined, and in such case the contract may apportion out of the amount so to be received by the city and specify a portion thereof which shall be deemed to be the rental for the use of each of the roads of the city maintained, equipped and operated under said contract. Any such contract shall provide for determining the amount of income, earnings or profits of the railroads whose gross earnings are so combined, and for such considerations may authorize the retention by the said railroad corporation for each year of the term of such contract, prior to the payment of any sums or of any part or portion of the income, earnings or profits to the city as rental for the use of the roads specified or provided for in such contract, of (a) a specified sum of money, which sum may represent the average annual income from operation of the said railroad or railroads theretofore constructed and operated by such corporation for any two or more years; (b) a sum not exceeding six per centum per annum for each year upon the investment of the said company including brokerage charges not ex-

ceeding three per centum, in the construction and equipment of the said road or roads of the city to be maintained and operated under such contract; and (c) a sum not exceeding the annual expense or cost to the contractor plus one per centum per annum on account of the contractor's investment in betterments or improvements upon or additions to such road or roads and equipment. Such contract may also provide that such annual payments shall be cumulative, and that any deficiency with respect thereto shall be paid off and discharged annually out of the said gross receipts before any payments by way of rental or compensation for the use of such roads shall be made to the city.

3. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said commission, with like approval; provided, that in case different parts of a road shall be constructed at different times or at intervals of time, or if the contract shall provide for the use by the contractor of an existing railroad as part of a continuous route as aforesaid, then and in any such case the public service commission may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the commission may be enabled to make a single operating contract or lease of the entire road. *The said commission may in its discretion, as one of the terms and conditions of any such contract, provide that as a considera-*

tion for the making of such contract the contractor in addition to any sums to be paid as in this act provided by way of rental or otherwise for the use of such road or roads shall contribute a part of the cost of construction of such road or roads which shall be contributed and disbursed by such method, in such manner and at such times as may be provided for in any such contract, and which contribution shall be deemed to be an investment by the contractor in the construction of such road or roads or to be part of the cost to the contractor of constructing such road or roads within the meaning of the first subdivision of this section providing for termination of such contract by the city. Any such contract may provide for the construction during the term of such contract of any branches or extensions of such road or roads and the construction of additional lines and for the equipment and operation thereof by the contractor in connection with the said road or roads and may make separate provision for apportioning the receipts of such road or roads and of such branches, extensions or additional lines and as to the compensation to be paid to the city for the use of any such branches, extensions or additional lines. The city may enter into a contract for the equipment, maintenance and operation of any such road or roads before contracts for construction of such road or roads or any portion or portions thereof shall have been made, and in such case the contract may provide that the city may construct or complete such road or roads or additions thereto or betterments thereof from time to time at the expense of the city or partly at the expense of the city and partly at the cost or through contribution of the contractor as aforesaid in such pro-

portion as may be agreed upon between the city and the contractor. Such contract for the equipment, maintenance and operation of such road or roads or any portion or portions thereof may be made and entered into as in this act provided before the consents shall have been obtained for any such road or roads or for any portion or portions thereof as provided in section five of this act, and before the detailed plans and specifications shall have been prepared as provided in section six of this act, provided, however, that in such case such contract for equipment, maintenance and operation of such road or roads or any portion or portions thereof shall be upon condition that such contract shall not become operative or go into effect as to such road or roads or such portion or portions thereof unless and until the city shall acquire the right to construct such road or roads or portion or portions thereof by obtaining such consents. The public service commission may in any contract reserve the right, upon conditions and for compensation to the contractor, as provided in the contract, to permit other persons, firms and corporations and the municipality itself to use the tracks, structure and line equipment of the railroad, or any portions thereof.

The passage in subdivision 3 indicated by black marginal line on page [redacted] originated in Laws of 1894, Chapter 752, as part of old Section 34 (renumbered 34a by Laws of 1906, Chapter 472), and has since remained substantially unchanged.

4. Every such contract shall further provide that the person, firm or corporation so contracting to equip, maintain and operate said road shall annually or at specified intervals pay into the treasury of said city, such rental for the use of said road, as shall be prescribed therein. The rental may be either a specified

sum of money or a specified *part or* proportion of income, earnings or profits of such road, or both a sum of money and a *part or* proportion of income, earnings or profits, as the said commission shall deem best suited to the public interest and the board of estimate and apportionment or other analogous local authority of such city shall approve. Every such contract may further provide that the amount and character of such rental may be readjusted at the expiration of a prescribed period *of* not more than twenty years, and be readjusted from time to time in the future at intervals each of not more than twenty years, and may prescribe a method of determining by arbitration or by the court the amount to be paid upon any readjustment thereof. *If such contract be made with a person, firm or corporation owning or actually operating or agreeing to operate a railroad or railroads wholly or in part within the limits of the city and shall make provision for the equipment, maintenance and operation of such road or roads of the city in connection with such railroad or railroads and for a single fare, the contract may provide that the gross receipts from the operation of such railroad or railroads within the limits of the city and from the operation of such road or roads of the city may be combined during the term of such contract and that the city shall receive for the use of the said road or roads at intervals named a specified part or proportion of the income, earnings or profits of the railroads whose receipts are so combined and the contract may, in such case, apportion out of the amount so to be received by the city and specify a portion thereof which shall be deemed to be the rental for the use of each of the roads*

of the city maintained, equipped and operated under such contract. In any such case the contract shall provide for determining the amount of the income, earnings or profits of the railroads whose gross earnings are so combined, and may authorize the retention, prior to the payment of any sums to the city for or on account of the city's investment in the construction of such road or roads or for the use of the same, of (a) a specified sum of money, which may represent the average annual income from operation of said railroad or railroads theretofore constructed during a period specified in such contract; (b) a sum not exceeding six per centum per annum for each year upon the investment of the contractor, including brokerage charges not exceeding three per centum, in the construction and equipment of the said road or roads of the city to be maintained and operated under such contract, and in the construction and equipment of extensions of any railroads and tracks not owned by the city thereafter constructed and to be operated under such contract; and (c) a sum not exceeding the annual expense or cost to the contractor, plus one per centum per annum, on account of the contractor's investment in betterments or improvements upon, or additions to such road or roads of the city, and upon or to any railroads not owned by the city and operated under such contract, and upon or to the equipment thereof. Such contract may also provide that such payments shall be cumulative, and that any deficiency with respect thereto shall be paid off and discharged annually out of the said gross receipts before any payments by way of rental or compensation for the use of such roads shall be made to the city. The contract may provide for a

readjustment at specified intervals of the part or proportion of the said income, earnings or profits of the railroads, which the city shall receive, or of the portion of the amount received by the city which shall be deemed to be the rental of each such road owned by the city, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its part or proportion of such income, earnings or profits or as such rental upon any such readjustment thereof.

5. Such rental and the term for the operation of the railroad included in any such contract shall begin, as to said road, or any section thereof, *at such time or times as may be provided in the contract.* The aforesaid rental shall be paid at such times during each year *or at such intervals* as said commission shall require. If a contract to equip, maintain and operate such road be made with the person, firm or corporation having or to have the contract to construct the same *and such contract shall provide that* said road shall be constructed wholly or in part at the cost of the said person, firm or corporation, the said road, however, to be the property of the city in the same manner and to the same extent as if constructed wholly with public money, *then* the contract *may* provide *as an alternative in lieu of the rental above provided for* that any and all income and increase derived by the contractor or on his behalf in any manner from the enterprise of constructing, equipping, maintaining and operating such road, shall after deducting operating expenses, taxes payments to reserve and amortization funds as provided for in the contract, and not exceeding six per cent. interest per annum payable quarterly upon the actual

cost to the contractor of construction and equipment of such road be divided share and share alike between the contractor and the city. The rental and any sums payable under such contract, *except any sum or sums of money that may be contributed toward the construction of any road or roads by the contractor having the contract for the equipment and operation of such road or roads*, shall be applied first to the payment of the interest upon bonds issued by said city for the construction and equipment of said road as hereinafter provided for, as the same shall accrue and fall due, and the remainder of said rental and moneys not required for the payment of said interest shall be kept separate and apart from any and all other moneys of such city and shall be securely invested and, with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued as aforesaid; said rental, moneys and accumulations of said fund over and above so much as may be required for payment of interest and principal of said bonds as aforesaid, shall be paid into the rapid transit fund hereinafter provided for.

6. Any such contract may also provide for a renewal or renewals not to exceed twenty years in the aggregate of the lease of said road upon the expiration of an original term of not more than twenty years upon such terms and conditions, to be approved by the board of estimate and apportionment, or other analogous local authority of such city, as to said commission may seem just and proper, and may also contain provisions for the valuation of the whole or part of the property of said contracting person, firm or corporation, employed in and

about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time, or should the same be terminated or expire as aforesaid. Such contract shall also state the date on which the operation of the road, or any section thereof, shall commence.

7. *In case the title to the equipment of said road shall not be vested in the city* the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenant, conditions and agreements of said contract, on his, their, or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The commission may, however, from time to time, relieve from such lien, any of the property to which the same may attach, upon receiving additional security, which may be deemed by said commission to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such commission shall seem just.

8. The said contract shall further provide that in case of the failure or neglect on the part of said contracting person, firm or corporation, *after such notice as the con-*

tract may prescribe, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by the public service commission, may *either terminate the contract* or take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, *and the said contract shall contain such terms, conditions and provisions in relation thereto as the said commission shall deem necessary or desirable for adequately safeguarding and protecting the rights and interests of said city; and the said contract shall contain appropriate terms, conditions and provisions for accomplishing such termination or taking possession.*

9. Any existing railroad corporation owning or actually operating a railroad wholly or in part within the limits of the city in and for which said commission has power to act, and approved by the commission, shall be competent and is hereby authorized to enter into any contract for the equipment, maintenance and operation of any railroad pursuant to the provisions of this chapter, or, after such a contract shall have been made, shall be competent and is hereby authorized, with the approval of the commission, to contract with the original contractor or his assignee or assignees for the maintenance and operation, (including the equipment or any part thereof,) of any railroad constructed or in process of construction *or to be constructed* pursuant to the provisions of this chapter, and shall have all the powers necessary to the due performance of such contract. A corporation may be organized under the railroad law of this state, *for the*

purpose of constructing, equipping, maintaining and operating a railroad pursuant to the provisions of this act or for the purpose of maintaining and operating a railroad, (including the equipment or any part thereof), already constructed, in process of construction *or to be constructed* pursuant to the provisions of this *act;* and any corporation so organized, upon the approval in writing of the commission, shall, in addition to the powers conferred by the general act under which such corporation is organized, be empowered, and is hereby authorized to enter into any contract permitted by law for the maintenance and operation when constructed, including the equipment or any part thereof if desired, as the case may be, of any such railroad *owned or to be owned by the city*, constructed or to be constructed at the expense of the city *or of such corporation or both* as in this act provided. The certificate of such approval shall be filed in the office of the secretary of state, and a copy thereof certified to be a true copy by the secretary of state or his deputy, shall be evidence of the fact therein stated. A corporation so organized shall not be required to procure the consent of the public service commission as provided for in section nine of the railroad law.

10. Where in this section or in section *twenty-six* of this act the consents referred to in section five of this act are mentioned, they shall be construed to include any consent given by the commissioners appointed by the general term or appellate division of the supreme court, and confirmed by the said general term or appellate division in lieu of the consent of property owners as hereinbefore provided.

Section 30. PLANS FOR MAINTENANCE AND OPERATION OF ROAD BY PUBLIC SERVICE COMMISSION.

1. If in the opinion of the board of estimate and apportionment, or other analogous local authority of such city, either a contract for equipment, maintenance and operation, or a contract for maintenance and operation as provided for in the preceding sections would be inexpedient, impracticable or prejudicial to the public interest, the public service commission shall forthwith devise and prepare a plan for the maintenance and operation of such road or roads, either by the commission or under a contract or contracts for the use of the tracks of said railroad or railroads for operation of cars thereon during a term of not more than five years for the carrying of passengers and property by one or more corporations approved by the commission owning or operating any railroad or railroads in said city, or organized for the purpose of operating cars as aforesaid over or upon said rapid transit railroad or railroads, and when said plan shall have been approved by the board of estimate and apportionment, or other analogous local authority of such city, the said commission shall either maintain and operate such road or roads for and on behalf of said city, or allow the use of the tracks of such railroad or railroads for the operation of cars for the transportation of persons or property by any such corporation or corporations. The compensation to be made or the rates of fare provided for in any operating contract or plan aforesaid shall be fixed by the commission with the approval of said board and shall be adjusted, fixed and readjusted always with a view to securing as nearly as

may be sufficient receipts therefrom, when added to the net revenues from such galleries, ways, subways or tunnels, and all other sources incidental or appurtenant to the use and operation of said road or roads, to provide for operating expenses, maintenance, interest on the cost, all other proper charges, and a sinking fund to discharge the bonds issued for the construction and equipment of such road or roads within a reasonable period, without recourse to taxation. Whenever it shall seem practicable to reduce rates of fare, the reduction shall in the first instance be in favor of school children, and then, next in order, in favor of all the public between six and nine o'clock ante meridian, and between four and seven o'clock post meridian and then for all the public from five o'clock ante meridian until seven o'clock post meridian, and lastly, for all the public at all times.

As enacted, as Section 34d by Laws of 1906, Chapter 472, renumbered as above by the Laws of 1909, Chapter 498.

Section 38. Modification of contracts.

The public service commission for and on behalf of the said city in which such road or roads may be constructed, may, from time to time with the consent, in writing, of the bondsmen or sureties of the person, firm or corporation which has contracted with said commission or its predecessors to construct, equip, maintain or operate any road or roads, agree with the said contracting person, firm or corporation upon changes in and modifications of said contract, or of the plans and specifications upon which said road or roads is or are to be constructed, but no change or modifications in the plans

and specifications consented to and authorized pursuant to section five of this act shall be made without the further consent and authorization provided for in said section.

This section as above printed is substantially the form in which it was first enacted by Laws of 1894, Chapter 752.

Section 63. PROVISO IN CASE ROAD CONSTRUCTED BY CITY.

Any railroad or railroads, so constructed by and at the city's expense shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the board of rapid transit railroad commissioners in said city or by the public service commission.

This section as printed above is substantially in the form in which it was first enacted by Laws of 1894, Chapter 752. It was renumbered Section 58 by the Laws of 1915, Chapter 604.

Railroad Law of the State of New York.

Pertinent sections are reprinted in the form in which they were in 1907, with new numbers shown in parenthesis as in the Consolidated Laws, Chapter 481, Laws of 1910.

(§ 57) § 37. RATES OF FARE. Every railway corporation may fix and collect the following rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile:

1. Where the motive power is rope, or cable, propelled by stationary power, five cents, with right to a minimum fare of ten cents; but if the railroad is less than two miles in length, and overcomes an elevation of five hundred feet or more to the mile, five cents for each one hundred feet of elevation so overcome, and the same rates of fare if the motive power is locomotives, furnished with cogs working into cogs on the railway, and the length of road does not exceed four miles.

2. If a road not incorporated prior to May fifteenth, eighteen hundred and seventy-nine, and not located in the counties of New York and Kings, or within the limits of any incorporated city, and not more than twenty-five miles in length, five cents; if over twenty-five and not more than forty miles, four cents; and if over forty miles, three cents. Where by the laying down of a third rail upon a railroad of the ordinary gauge, a narrow-gauge track is created and used for

the transportation of passengers, and the length of road does not exceed six miles, including any connecting road of the same gauge, such railroad, for the purpose of fare, shall be deemed a narrow-gauge road.

3. If its railroad overcomes an elevation of two hundred feet to the mile, for at least two consecutive miles, and does not exceed twenty miles in length, ten cents; if it overcomes an elevation exceeding three hundred feet to the mile, within a distance of two miles, five cents for each one hundred feet of elevation; and where it overcomes an elevation of more than one thousand feet, within a distance of two miles, seven cents for each one hundred feet of elevation in a mile.

4. If the lines of its road does not exceed fifteen miles in length, and does not enter or traverse the limits of any incorporated city, and the distance traveled thereon by the passenger does not exceed one mile, five cents.

5. In all other cases, three cents for every such mile or fraction thereon, with a right to a minimum single fare of not less than five cents.

This chapter shall not be construed to allow any rate of fare for way passengers greater than two cents per mile to be charged or taken over the tracks or tracks of the railroad known as the New York Central Railroad Company, and the rate of fare for way passengers over the track or tracks of such company shall continue to be two cents per mile and no more, wherever it is restricted to that rate of fare, nor shall any consolidated railroad corporation charge a higher rate of fare per passenger per mile upon any part or portion of the

consolidated line than was allowed by law to be charged by each existing corporation thereon previously to such consolidation.

Derived from the Railroad Law of 1890, Section 37, as amended by Laws of 1892, Chapter 676.

By Chapter 481 of the Laws of 1910, there was added as a prefix at the beginning of the section the words "Subject to the provisions of the public service commissions law," and the section was renumbered 57.

(§ 173) § 93. CONDITIONS UPON WHICH CONSENT SHALL BE GIVEN; SALE OF FRANCHISE AT PUBLIC AUCTION. The consent of the local authorities in cities containing twelve hundred and fifty thousand inhabitants or more, according to the last federal census or state enumeration, must contain the condition that the right, franchise and privilege of using any street, road, highway, avenue, park or public place shall be sold at public auction to the bidder who will agree to give the city the largest percentage per annum of the gross receipts of such corporation, with a bond or undertaking in such form and amount and with such conditions and sureties as may be required and approved by the comptroller or other chief fiscal officer of the city, for the fulfillment of such agreement and for the commencement and completion of its railroad within the time designated by law and for the performance of such additional conditions as the local authorities in their discretion may prescribe. Whenever such consent shall provide for the sale at public auction of the right to construct and operate a branch or extension of an existing railroad, such consent shall provide that but one fare shall be exacted for passage over such branch or extension and over the line of road which shall have

applied therefor; and further, that if such right shall be purchased by any corporation other than the applicant, that the gross receipts from joint business shall be divided in the proportion that the length of such extension or branch so sold shall bear to the entire length of the road whether owned or leased which shall have applied therefor and of such branch or extension, and that if such right shall be purchased by the applicant, the percentage to be paid shall be calculated on such portion of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension or branch shall bear to the entire length of its road, whether owned or leased. * * * The local authorities may, in their discretion, make their consent to depend upon any further conditions respecting other or further security, or deposit, suitable to secure the construction, completion and operation of the railroad within any time not exceeding the period prescribed in this article and respecting the character, quality or motive power of the road to be completed and respecting the grouping of streets, avenues and highways into one route, or into several routes, for the purpose of a single sale of the franchise, right or privilege for all the routes collectively, or of the separate sale for each route or street, as said local authorities may think expedient and respecting the payment of the percentage agreed to be paid at the sale upon all the lines operated by the successful bidder within the city and respecting any matter involved in or affecting the computation of percentage payments and respecting the use of the railroads to be constructed under the consent by any other company and respecting the interchange of traffic and division

of fares between the company operating such railroads and any other company, and respecting the application of any provision herein contained as to carriage of passengers for single fare and the division of gross receipts and the payment of percentages to the line leased or operated under contract by the applicant for an extension, and also respecting any other matter concerning which, in their judgment, further conditions would be for the public interest. Any and all consents, sales and proceedings heretofore granted, made or taken in substantial compliance with the provisions of this section, as now last amended, are hereby approved, ratified and confirmed, and any purchaser or successor to or transferee of the rights of the purchaser of any right or privilege heretofore sold substantially in accordance with the provisions of this section as now amended is authorized to acquire the requisite consents of property owners, or, in lieu thereof, determinations by the appellate division of the supreme court, and to proceed with the construction of its road, at any time within three years hereafter.

Derived from the Railroad Law of 1890 as amended by Chapter 494, Laws of 1901.

By Chapter 481 of the Laws of 1910, the section was renumbered 173. By Laws of 1908, Chapter 475, the section was made applicable to all cities of the first class, instead of being limited to those having a population of more than twelve hundred and fifty thousand; the last sentence of the section was eliminated and the following sentence substituted therefor: "Nothing herein contained shall apply to, or affect any grant hereafter made under the provisions of title one, chapter three of chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven and the amendments thereto known as the Greater New York Charter."

(§ 181) § 101. RATE OF FARE. No corporation constructing and operating a railroad under the provisions

of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. Not more than one fare shall be charged within the limits of any such city or village, for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article; except that in any city of the third class, or incorporated village, it shall be lawful for such corporation to charge and collect as a maximum rate of fare for each passenger, ten cents, where such passenger is carried in a car which overcomes an elevation of at least four hundred and fifty feet within a distance of one and a half miles. This section shall not apply to any part of any road constructed prior to May sixth, eighteen hundred and eighty-four, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article.

Railroad Law of the State of New York—Section 129 (subd. 1).

Derived from Railroad Law of 1890, Section 101, as amended by Laws of 1897, Chapter 688.

By Chapter 481, Laws of 1910, there was added, at the end of the section, the words "and the public service commission shall possess the same power, to be exercised as prescribed in the public service commissions law," and the section was renumbered 181.

(§ 229) § 129. POWERS. Every such corporation shall have power, in addition to the powers conferred by the general and stock corporation laws and by subdivisions two, five and seven of section eight of this chapter:

1. To take and convey persons and property on its railroad by the power or force of steam or by any motor other than animal power, and to receive compensation therefor.

Derived from Railroad Law of 1890, Section 129; originally revised from Chapter 606, Laws of 1875, Section 26.

By Chapter 481, Laws of 1910, there was added as a prefix at the beginning of the section the words "Subject to the provisions of the public service commissions law" and the section was renumbered 229.

Transportation Corporations Law of the State of New York.

Pertinent sections reprinted in the form in which they were in 1907, with new numbers in parenthesis shown as in the revised law of 1926.

(§ 11) § 61. POWERS. Every such corporation shall have the following additional powers:

1. If incorporated for the purpose of supplying gas for light, to manufacture gas, and to acquire by purchase or otherwise natural gas and to sell and furnish such quantities of gas as may be required in each city, town and village named in its certificate of incorporation, for lighting the streets and public or private buildings or for other purposes; and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways, in each such city, village and town, with the consent of the muncipal authorities thereof, and under such reasonable regulations as they may prescribe; and such municipal authority shall have power to exempt any such corporation from taxation on its personal property for a period not exceeding three years from the organization of the corporation. Any corporation authorized under any general or special law of this state to manufacture and supply gas shall have the like powers and privileges.

Derived from Chapter 596, Laws of 1902.

By Chapter 219, Laws of 1909 (the Consolidated Transportation Corporations Law), the subdivision was re-enacted without change from the foregoing. It was amended in certain minor respects by Chapter 540 of the Laws of 1920, and Chapter 539 of the Laws of 1923, but neither amendment affected or changed the provision giving the local authorities power to attach reasonable regulations to their consent.

Transportation Corporations Law—Section 45.

By Chapter 762, Laws of 1926, the section was renumbered as 11; subdivision 1 was somewhat shortened but the provision as to attaching reasonable regulations to the municipal consent was not affected.

(§ 86) § 45. No pipe line shall be constructed across, along or upon any public highway without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners. If such consent or the consent of the commissioners or municipal authorities required by the preceding section cannot be obtained, application may be made to the general term of the supreme court of the department in which such highway or bridge is situated for an order permitting the corporation to construct its line across, along or upon such highway, or across or upon such bridge. The application shall be by duly verified petition and notice which shall be served upon the commissioners of highways of the town in which the highway is situated, or the municipal authorities of the village or city where such bridge is located, according to the practice or order of the court, or by an order to show cause, and the court upon the hearing of the application may grant an order permitting the line to be so constructed in such manner and upon such terms as it may direct.

Derived from Chapter 566, Laws of 1890.

By Chapter 219, Laws of 1909 (the Consolidated Transportation Corporations Law), the section was re-enacted, the sole amendment to the foregoing being the substitution of the words "appellate division of the supreme court" for "the general term of the supreme court."

By Chapter 762, Laws of 1926, the section was renumbered as 86; the town superintendent of highways was substituted for commissioners of highways, and provision was made for application to the supreme court instead of the appellate division.

Greater New York Charter.

Chapter 466, Laws of 1901.

Provisions Regulating Terms and Conditions for Franchise Grants.

§ 73. After the approval of this act no franchise or right to use the streets, avenues, waters, rivers, parkways, or highways of the city shall be granted by any board or officer of The City of New York under the authority of this act to any person or corporation for a longer period than twenty-five years, except as herein provided, but such grant may, at the option of the city, provide for giving to the grantee the right on a fair revaluation or revaluations to renewals not exceeding in the aggregate twenty-five years. Nothing in the foregoing provisions of this section contained shall apply to consents granted to tunnel railroad corporations, nor shall anything in this section or in ths title contained apply to grants made pursuant to the rapid transit act, chapter four of the laws of eighteen hundred and ninety-one or the acts amendatory thereof. The board of estimate and apportionment is hereby authorized, in its discretion to grant a franchise or right to any railroad corporation to use any of said streets, avenues, waters, rivers, parkways or highways in The City of New York for the construction and operation of a tunnel railroad underneath the surface thereof for any period not exceeding fifty years, and any such grant may at the option of the city provide for giving to the grantee the right, on a fair revaluation or revaluations, to renewals not exceed-

ing in the aggregate twenty-five years, provided, however, that any grant to construct a tunnel railroad or renewal thereof, shall only be made after an agreement has been entered into by such a tunnel corporation to pay to The City of New York at least three per centum of the net profits derived from the use of any tunnel which it shall construct, after there shall have first been retained by such company from such net profits a sum equal to five per centum upon the sum expended to construct such tunnel. At the termination of any franchise or right granted by the board of estimate and apportionment all the rights or property of the grantee in the streets, avenues, waters, rivers, parkways and highways shall cease without compensation. Every such grant of a franchise and every contract made by the city in pursuance thereof may provide that upon the termination of the franchise or right granted by the board of estimate and apportionment the plant of the grantee with its appurtenances, shall thereupon be and become the property of the city without further or other compensation to the grantee; or such grant and contract may provide that upon such termination there shall be a fair valuation of the plant which shall be and become the property of the city on the termination of the contract on paying the grantee such valuation. If by virtue of the grant or contract the plant is to become the city's without money payment therefor, the city shall have the option either to take and operate the said property on its own account, or to lease the same for a term not exceeding twenty years. If the original grant shall provide that the city shall make payment for the plant and property, such payment shall be at a fair valuation of the same as property,

excluding any value derived from the franchise; and if the city shall make payment for such plant it shall in that event have the option either to operate the plant and property on its own account or to lease the said plant and property and the right to the use of streets and public places in connection therewith for limited periods, in the same or similar manner as it leases the ferries and docks. Every grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant. The grant or contract shall also specify the mode of determining the valuation and revaluations therein provided for.

As amended by Chapter 629, Laws of 1905. No change since.

§ 74. Before any grant of the franchise or right to use any street, avenue, waterway, parkway, park, bridge, dock, wharf, highway or public ground or water within or belonging to the city shall be made by the board of estimate and apportionment, the proposed specific grant embodied in the form of a contract with all of the terms and conditions, including the provisions as to rates, fares and charges, and together with the form of the resolution or resolutions for the granting of the same, shall be entered in the minutes of the board of estimate and apportionment and after such entry shall be published at least twenty days in the City Record and at least twice in two daily newspapers published in the city to be designated by the mayor at the expense of the proposed grantee. The board of estimate and apportionment shall, before authorizing any such contract or adopting any such resolution, set a date or dates

for a public hearing thereon at which citizens shall be entitled to appear and be heard. No such hearing shall be held however until notice thereof shall have been published for at least ten days immediately prior thereto in the City Record and at least twice in two daily newspapers published in the city to be designated by the mayor, at the expense of the proposed grantee, and the said board of estimate and apportionment before authorizing any such contract or adopting any such resolution shall make inquiry as to the money value of the franchise or right proposed to be granted and the adequacy of the compensation proposed to be paid therefor, and publish the results of such inquiry at least ten days in the City Record and at least twice in the daily newspapers in which such form of contract shall be published. Every such contract or resolution shall be entered on the minutes or record of such board of estimate and apportionment, and every contract or resolution containing or making such grant shall require the concurrence of members of the board of estimate and apportionment entitled as provided by law to three-fourths of the total number of votes to which all the members of the said board shall be entitled, and the votes shall be shown by the ayes and noes as recorded in the minutes of the board. Thirty days at least shall intervene between the introduction and final passage of any such resolution or authorization of such contract. The separate and additional approval of the mayor shall be necessary to the validity of every such contract or resolution. This act shall apply to any renewal or extension of the grant or leasing of the property to the same grantee or to others. Within five days after the adoption of any such resolu-

tion or any such authorization, a copy thereof, including the full text of the franchise, grant or contract, and duly attested by the clerk of the board of estimate and apportionment, shall be transmitted to each of the following: The comptroller, the corporation counsel, the city clerk and the board of rapid transit railroad commissioners of The City of New York, to be preserved by them among the archives of their departments or office. All such certified copies shall be deemed to be public records.

As amended by Chapter 630, Laws of 1905.

By Chapter 467, Laws of 1914, the foregoing section was *repealed*, and a new Section 74 substituted. The provision as to the proposed franchise, being embodied in a contract, "including the provisions as to rates, fares and charges," was inserted in the new enactment, without change.

Statutory Provision for Fare of Five Cents Applicable to Elevated Railroads.

LAWS OF NEW YORK—1894—CHAPTER 743.

AN ACT to facilitate travel upon elevated railroads in the City of New York.

Became a law May 21, 1894, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Any passenger upon the Manhattan elevated railway who has paid the fare required for passage from any point on said railway east of Broadway, between the Battery and One Hundred and Twenty-ninth street, not exceeding five cents, shall be entitled to a continuous passage, without change of cars, on the suburban rapid transit railway or on any railway owned or operated by the Manhattan railway company, within the city of New York, in connection with said Manhattan elevated railway from One Hundred and Twenty-ninth street, or other termini of the lines of said Manhattan elevated railway south of the Harlem river, to any station on the route of said suburban rapid transit railroad, or such other elevated railroad as may be operated by the Manhattan railway company north of the Harlem river, without the payment of additional fare; and any passenger on the suburban rapid transit railroad, or any elevated railway owned or operated by the Manhattan railway company in connection with the

Manhattan elevated railroad, within the city of New York, running southward to One Hundred and Twenty-ninth street, or other termini of the Manhattan railroad, who has paid the fare required on said suburban rapid transit railroad to One Hundred and Twenty-ninth street in the city of New York, not exceeding five cents, shall be entitled to a continuous passage, without change of cars, over the Manhattan elevated railway to any station on its route east of Broadway, between One Hundred and Twenty-ninth street and the Battery, without the payment of additional fare.

§ 2. This act shall take effect immediately.

Contract No. 1.

Executed February 21, 1900.

Provision as to Fares.

From Chapter III—the Lease:

The Contractor shall during the term of the Lease be entitled to charge for a single fare upon the Railroad the sum of five (5) cents, but not more. The Contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one (1) car upon each train, and may collect from each passenger in such car a reasonable charge for such additional conveniences furnished him, provided that the amount to be charged therefor and the character of such additional conveniences shall from time to time be subject to the approval of the Board.

Contract No. 2.

Executed July 21, 1902.

Provision of that Agreement as to Fares.

From Chapter III—the Lease:

The Contractor shall during the term of the Lease be entitled to charge for a single fare upon the Railroad the sum of five (5) cents, but not more. The Contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one (1) car upon each train, and may collect from each passenger in such car a reasonable charge for such additional conveniences furnished him, provided that the amount to be charged therefor and the character of such additional conveniences shall from time to time be subject to the approval of the Board.

Contract No. 3.

Executed March 19, 1913.

The Pertinent Parts Are Reprinted as Shown.

The Opening Paragraph, showing the Parties:

AGREEMENT entered into this 19th day of March, in the year one thousand nine hundred and thirteen, between THE CITY OF NEW YORK (hereinafter referred to as "THE CITY"), acting by the PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT (hereinafter referred to as "THE COMMISSION"), party of the first part, and INTERBOROUGH RAPID TRANSIT COMPANY (hereinafter referred to as "THE LESSEE"), party of the second part.

From the Recitals:

WHEREAS, the Commission has determined that the public interests require the entering into a contract with the Lessee for the equipment, maintenance and operation of additional or proposed rapid transit railroads in conjunction with the said railroads heretofore constructed at the expense of the City under Contract No. 1 and Contract No. 2, for a single fare and further require the modification of Contract No. 1 and Contract No. 2, all as in this contract provided.

Contract No. 3.

From Chapter I of Part First ("General Provisions"), entitled "Outline of Contract and Definition":

ARTICLE I. The Lessee agrees with the City to contribute toward the cost of construction of the Railroad, to equip the Railroad as the several parts thereof are respectively constructed and ready for equipment and operation and thereafter to use, maintain and operate the same in conjunction with the railroads heretofore constructed at the expense of the City under Contract No. 1 and Contract No. 2 for a single fare, in accordance with this contract. The City on its part agrees as hereinafter provided that if the Lessee will contribute toward the cost of construction it will construct the Railroad and hereby leases the Railroad to the Lessee for the term of years hereinafter specified but reserves the right upon the terms and conditions hereinafter provided to terminate this contract so far as it relates to the equipment, maintenance and operation of the Railroad at any time after the expiration of ten (10) years from the date when operation of any part of the Railroad shall actually begin * * *. The City and the Lessee further agree upon the modification of Contract No. 1 and Contract No. 2 in the respects herein set forth, but nothing in this contract shall be construed as a modification or waiver of any of the rights or obligations of the respective parties under Contract No. 1 and Contract No. 2, except in the respect and to the extent herein specifically set forth.

ARTICLE II. The following words and expressions used in this contract shall, except where by the text it

is clear that another meaning is intended, be construed as follows:

* * * * * *

11. The words "EXISTING RAILROADS" to mean the railroads constructed or provided under Contract No. 1 and Contract No. 2. Betterments, additions and improvements initiated prior to the beginning of the Lease shall be deemed to be constructed under and in accordance with the provisions of Contract No. 1 or Contract No. 2 as the case may be. Whenever the expression "Railroad and Existing Railroads" is used in connection with maintenance and operation it shall be deemed to mean the maintenance and operation, as the case may be, of the Railroad in conjunction with the Existing Railroads under Part Third of this contract, except as provided in Article XXIII.

12. The words "EXISTING EQUIPMENT" to mean the equipment provided under Contract No. 1 and Contract No. 2 prior to the commencement of the Lease and any repairs, replacements, substitutions or renewals thereto or thereof.

* * * * * *

From Chapter VII of Part First, entitled "Miscellaneous":

ARTICLE XXXV. It is the intent and understanding of the parties to this agreement that each and every provision of law now required to be inserted in this contract should be and is inserted herein. Furthermore, it is hereby stipulated that every such provision is to be deemed to be inserted herein; and if, through mistake or otherwise, any such provision is omitted or is not in-

serted in correct form, then the contract shall forthwith, upon the application of either party, be amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party hereunder.

ARTICLE XXXVI. If this contract contains any unlawful provision not an essential part of the general structure of the contract and which shall not appear to have been a controlling or very material inducement to the making thereof the same shall be deemed of no effect, and shall upon the application of either party be stricken from the contract without affecting the binding force of the contract as it shall remain after omitting such provision.

From Chapter I of Part Third ("The Lease"), entitled "Length of Term, etc.":

ARTICLE XLVII. The City hereby leases the Railroad and the Equipment to the Lessee, for operation in conjunction with the Existing Railroads and Existing Equipment for a single fare. The Lease shall be for a term beginning on the first day of January, 1917, and expiring at midnight on the thirty-first day of December, 1965; subject, however, to earlier termination as hereinafter provided. • • •

ARTICLE XLVIII. The original term of the lease of the portion of the Existing Railroads constructed under Contract No. 1 which now expires on October 27, 1954, and the original term of the lease of the portion of the Existing Railroads constructed under Contract No. 2 which now expires on May 1, 1943, are hereby modified and extended until midnight of December 31,

1965 (or until such later date to which the Lease of the Railroad may be extended as provided in Article XLVII), so that the leases of the Existing Railroads shall expire co-temporaneously with the Lease of the Railroad. The rentals to be paid by the Lessee for such extended original terms shall be as provided in this Article and in paragraph 1 (a) of Article XLIX. Such leases of the Existing Railroads shall not, however, be subject to termination by notice except as portions thereof may be taken over in substitution for the Seventh Avenue Branch, or the Lexington Avenue Branch, all as hereinafter provided under Chapter VI. In consideration of such extension of such original terms, the Lessee expressly waives, and releases the City from, all rights to the renewal terms provided for in Contract No. 1 and Contract No. 2 and such renewal terms are hereby in their entirety cancelled and abrogated. Such abrogation of such renewal terms shall remain in full force and unaffected by any termination of the lease of the Railroad, it being understood and agreed that the extension of such original terms in and of itself is sufficient consideration to the Lessee for the cancellation and abrogation of such renewal terms.

From Chapter II of Part Third, entitled "Rental":

ARTICLE XLIX. In consideration of the operation of the Railroad and the Existing Railroads in conjunction with each other for a single fare and of the contribution by the Lessee to or toward the cost of construction of the Railroad as aforesaid and in further consideration of the covenants and agreements by the Lessee to modify

the term or terms of Contract No. 1 and Contract No. 2, upon the commencement of operations of the portions of the Railroad specified in Article XLVII, the gross receipts from whatever source derived directly or indirectly by the Lessee or on its behalf in any manner from, out of or in connection with the operation of the Railroad and the Existing Railroads (hereinafter referred to as the "revenue") shall be combined during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings or profits of the Railroad and the Existing Railroads. The amount of such income, earnings and profits shall be determined as follows:

From the revenue the Lessee shall at the end of each quarter year ending December 31, March 31, June 30 and September 30 deduct in the order named:

1 (a) The rentals required to be paid to the City under Contract No. 1 and Contract No. 2 for the Existing Railroads in the amount payable when the term of the Lease begins. Such rentals shall be paid to the City for the full modified term of the leases of the Existing Railroads, as rentals, irrespective of the amortization or refunding of any bonds issued by the City to provide means for the construction of the Existing Railroads.

(b) Such rentals, actually and necessarily payable by the Lessee for the use of other property in connection with the Railroad and the Existing Railroads, under contracts or leases approved by the Commission, as are not included in operating expenses in the accounting system prescribed by the Commission.

2. Taxes, if any, upon property actually and necessarily used by the Lessee in the operation of the Railroad and Existing Railroads, together with all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises or otherwise) assessed or which may hereafter be assessed against the Lessee in connection with or incident to the operation of the Railroad and the Existing Railroads. Also such assessments for benefits as are not properly chargeable to cost of construction or cost of equipment.

3 All expenses, exclusive of maintenance, actually and necessarily incurred by the Lessee in the operation of the Railroad and the Existing Railroads.

4 An amount equal to twelve per centum (12%) of the revenue for the maintenance, exclusive of depreciation, of the Railroads, the Equipment, the Existing Railroads and the Existing Equipment. Such maintenance shall include the repair and replacement of tracks and also parts of continuous construction and parts of equipment units, but shall not include the replacement of any of the principal parts of the railroad structure and equipment, as such principal parts are from time to time specified and defined by the Commission. If, in any quarter year, such maintenance shall cost less than twelve per centum (12%) of the revenue, the unexpended balance shall be transferred to the depreciation funds provided for in paragraph 5 of this article; and if in any quarter year such maintenance shall cost more than such twelve per centum (12%) of the revenue, an amount equal to the excess may be withdrawn from or charged to such depreciation funds and applied to such maintenance.

5 For the first year of operation under the Lease an amount equal to five per centum (5%) of the revenue for depreciation of such portions of the Railroad and the Equipment and the Existing Railroads and the Existing Equipment as are not repaired or replaced through the expenditures for maintenance provided for in paragraph 4 of this article. Prior to the beginning of the Lease the Commission and the Lessee shall agree upon the classification of such five per centum (5%) to accord with its division into the depreciation funds hereinafter in this article provided for. If prior to the beginning of the Lease the Commission and the Lessee are unable to agree upon such classification, the same shall be determined by arbitration or by the court. Within thirty (30) days after the thirtieth day of June following the beginning of the Lease and annually thereafter the Commission and the Lessee shall determine the classification and amount of depreciation, and excess maintenance not covered by the amount set aside under paragraph 4 of this Article, during the preceding fiscal year, and the deduction for such year shall thereupon be adjusted to conform with such determination. If within such period the Commission and the Lessee are unable to agree upon the classification and amount of depreciation during the preceding fiscal year, the amount thereof shall thereupon be determined by arbitration or by the court. The said five per centum (5%) for the first year of operation and the amount determined as hereinbefore provided for future years shall be divided in accordance with such classification and paid into three depreciation funds. The first of such funds shall be known as the "Depreciation Fund for the Railroad and Equipment," the second of

such funds shall be known as the "Depreciation Fund for Existing Railroads" and the third of such funds shall be known as the "Depreciation Fund for Existing Equipment." If necessary the maintenance fund provided for in paragraph 4 of this Article shall be similarly divided in accordance with the same procedure as hereinbefore outlined for the depreciation funds. Such funds shall be further divided from time to time as may be necessary. Such funds shall be in the charge of and under the control and direction of the Depreciation Fund Board. The cost of all replacements of the principal parts (as such principal parts are from time to time specified and defined by the Commission) of the Railroad and Equipment and of the Existing Railroads and Existing Equipment due either to wear and tear or to obsolescence, inadequacy or age and also any excess in the cost of maintenance as provided in paragraph 4 of this article shall be paid from the appropriate fund. When any principal part of the Railroad of the Equipment or the Existing Railroad or the Existing Equipment is retired or withdrawn from service, an amount equal to its cost shall be withdrawn from the appropriate fund and expended on new construction or new equipment. Any new equipment thus acquired to replace any part of the Existing Equipment shall be deemed to have been acquired and supplied by the Lessee under the provisions of Contract No. 1 or Contract No. 2; and nothing in this Article or elsewhere in this contract contained shall be construed as a waiver or modification of the City's obligation thereunder to buy; at the expiration of the modified terms thereof, the Existing Equipment in accordance with the provisions of Contracts Nos. 1

and 2. Any salvage or proceeds on parts so retired or withdrawn shall be paid into the appropriate fund. Any amounts in such funds not currently needed for the purposes herein specified shall be securely invested and reinvested by the Depreciation Fund Board and all interest and profits accruing thereon shall be returned to the revenue. The Depreciation Fund Board shall have the right to sell investments to meet current needs and for purposes of reinvestment. A permanent record of the depreciation of each class of construction and equipment of the Railroad and the Existing Railroads (as such classes are from time to time defined or specified by the Commission) shall be kept by the Lessee in the form prescribed from time to time by the Commission. At the expiration of the term of the Lease, or upon earlier termination as hereinafter provided, any amount in the Depreciation Fund for the Railroad and Equipment shall be paid to the City or to a new lessee as may be directed by the Commission. In case of the termination of the Lease, pursuant to notice, as to all of the Railroad, any amount in the Depreciation Fund for Existing Railroads and any amount in the Depreciation Fund for Existing Equipment shall be paid to the Lessee. At the expiration of the term of the Lease any amount in the Depreciation Fund for Existing Railroads shall be paid to the City and any amount in the Depreciation Fund for Existing Equipment shall be paid to the Lessee. In case the City shall terminate the contract as to a specified portion or portions of the Railroad as hereinafter provided, the Commission and the Lessee shall determine what proportion of the first of such funds shall then be paid over to the City or to a new lessee on account of depreciа

tion of the specified portion (including the Equipment thereof) as to which the contract is so terminated and in case of their failure to agree upon such amount the same shall be determined by arbitration or by the court.

6 One-quarter (¼) of the sum of six million three hundred and thirty-five thousand ($6,335,000) dollars to be retained by the Lessee for each quarter year of the term of the Lease as representing the average annual income from the operation of the Existing Railroads.

7 One-quarter (¼) of an amount equal to six per centum (6%) of the Lessee's contribution toward the cost of construction of the Railroad and the cost of equipment of the Railroad for initial operation (such contribution and such cost of equipment, however, not to exceed Eighty million ($80,000,000) Dollars), for each quarter year of the term of the Lease, out of which the Lessee shall set aside amounts sufficient, with interest and accretions thereon, to amortize within the term of the Lease such contribution and such cost. In the event of the commencement of operation prior to the completion of the Railroad, such one-quarter of six per centum (¼ of 6%) shall be computed upon the basis of the Lessee's contribution toward the cost of construction and the cost of equipment of the part or parts of the Railroad then in operation.

8 When the Lessee shall provide Additional Equipment (except Additional Equipment belonging to the Extension), then an amount to be retained by the Lessee equal to one-quarter of the annual interest payable by the Lessee (or, in the event that the Lessee should not borrow money for such purpose, then an amount equal

to one-quarter (¼) of the interest at the annual average rate payable by the Lessee on long term securities issued by it for the purpose of carrying out its obligations under this contract) upon the cost of each additional unit (as the words "additional unit" are defined in Article LXXI), together with a sum equal to one-quarter of one per centum (¼ of 1%) of the cost of each additional unit, which latter amount shall be paid into a separate sinking fund which with interest and accretions shall be promptly and securely invested and reinvested by it for the amortization of the cost of such additional unit. Upon the completion of the amortization of the cost of any additional unit the payments provided for in this paragraph in respect of such additional unit shall cease and any balance in the sinking fund of any amounts with interest or accretions thereon set aside for the amortization of the cost of such additional unit shall be paid into the revenue.

9 When the Lessee shall share the cost of construction of Additions to the Railroad and Existing Railroads then an amount equal to one-quarter (¼) of the annual interest payable by the Lessee (or, in the event that the Lessee should not borrow money for such purpose, then an amount equal to one-quarter (¼) of the interest at the average annual rate payable by the Lessee on long term securities issued by it for the purpose of carrying out its obligations under this contract) upon its share of the cost of construction of each additional unit, together with an amount equal to one-quarter of one per centum (¼ of 1%) of the Lessee's share of the cost of construction of each additional unit, which latter amount shall be paid into a separate sinking fund which with interest and

accretions shall be promptly and securely invested and reinvested for the amortization of the Lessee's share of the cost of construction of such additional unit. Upon the completion of the amortization of the Lessee's share of the cost of construction of any additional unit the payments provided for in this paragraph in respect of such additional unit shall cease and any balance in the sinking fund of any amounts or interest or accretions thereon set aside for the amortization of the Lessee's share of the cost of construction of such additional unit shall be paid into the revenue.

10 An amount for each quarter year of the term to be paid to the City equal to one quarter (¼) of eight and seventy-six one hundredths (8.76%) per centum of the portion of the cost of construction of the Railroad, exclusive of additions, paid by the City.

11 An amount to be paid to the City equal to one quarter (¼) of the annual interest actually payable by the City (or, in the event that any portion of the cost of construction borne by the City should be met other than by the issuance of corporate stock or other long term interest bearing securities, then an amount equal to one-quarter (¼) of the interest at the annual rate specified in the last then preceding sale by the City of corporate stock or other long term interest bearing securities) upon its share of the cost of construction of each additional unit of Additions to the Railroad and Existing Railroads, together with an amount equal to one-quarter of one per centum (¼ of 1%) of its share of the cost of construction of each such additional unit of Additions to furnish a sinking fund for the amortization of the

City's share of the cost of construction of such additional unit. Upon the completion of the amortization of the City's share of the cost of construction of any additional unit the payments provided for in this paragraph in respect of such additional unit shall cease and any balance in the sinking fund of any amounts or interest or accretions thereon set aside for the amortization of the City's share of the cost of construction of such additional unit shall be paid into the revenue.

12. One per centum (1%) of the revenue which shall be paid into a separate fund to be in the charge and under the direction and control of the Depreciation Fund Board and which with interest and accretions shall be securely invested and reinvested by it to provide a contingent reserve fund. When any such fund with interest and accretions shall equal one (1%) per centum of the cost of construction and the cost of equipment of the Railroads or of the portion thereof remaining in operation, payments to such fund shall be suspended and interest thereon shall be paid into the revenue. If thereafter such fund shall fall below such one (1%) per centum payments at the rate aforesaid shall be resumed until the fund with interest and accretions again equals such one (1%) per centum. Such fund shall be used to meet deficits in operation and the payment of the various obligations and deductions hereinbefore in this article referred to and for such other purposes as may from time to time be approved by the Commission. At the end of the term, or sooner termination thereof, any balance in this fund, after the payment of any claims against the Lessee arising out of operation, shall be paid into the revenues.

13 The amount remaining after making all such deductions shall be deemed to be the income, earnings and profits of the Railroad and the Existing Railroads.

ARTICLE L. Of the income, earnings and profits of the Railroad and the Existing Railroads fifty (50%) per centum shall be paid to the City and the remaining fifty (50%) per centum shall be retained by the Lessee.

ARTICLE LI. If in any quarter year the revenue shall be insufficient to meet the various obligations and deductions referred to in Article XLIX the deficits shall be cumulative and payments of such deficits shall be thereafter made in full before deducting the amounts required in the paragraph of such article succeeding the paragraph providing for the payment of the obligations or deductions as to which there has been such deficit. Interest shall be payable upon such deficits at the actual rate payable by the Lessee or the City, or in the event that the Lessee or the City should not borrow money for the purpose of paying such deficits, then at the average rate of interest payable by the Lessee or the City on long term securities issued for the purpose of carrying out their obligations under this contract. Interest upon such deficits shall semi-annually be added to and form a part of the cumulative deficits.

From Chapter III of Part Third, entitled "Character of Service, Rate of Fare, etc.":

ARTICLE LIX. The Lessee shall operate the Railroad and the Existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given, as

required by the Commission under regulations prescribed or approved by it, between all trains operated by the Lessee at common or connecting points (where interchange station facilities are supplied by the Lessee or required by the Commission) of (1) any part or parts of the Railroad, and (2) any part or parts of the Existing Railroads and (3) between any part or parts of the Railroad and any part or parts of the Existing Railroads, so as to afford a continuous trip in the same general direction for a single fare.

ARTICLE LXII. The Lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroad and the Existing Railroads the sum of five (5) cents but not more.

ARTICLE LXIX. The City reserves the right to permit the New York Municipal Railway Corporation, its successors and assigns, or any other operator, upon the terms hereinafter stated, to use the tracks, structures and line equipment of Subdivisions III, IV and V of the Steinway Tunnel Line and any Extensions thereof, or of any such subdivisions, for at least half the capacity thereof if required, and the City reserves the right for the Lessee, as the operator and lessee of the railroads owned by the Manhattan Railway Company (and for the successors and assigns of the Lessee) upon the terms hereinafter stated, to use the tracks, structures and line equipment of Subdivision II of the Lexington Avenue Branch, of the White Plains Road Line and of the Queensboro Bridge Plaza portion of Subdivision II of the Steinway Tunnel Line and of Subdivisions III, IV and V of the Steinway Tunnel Line or of any of them or of any Extensions thereof. The

terms and conditions for such use shall be reasonable and may be agreed upon between the Commission, the Lessee and such other lessee or operator. In the event that they fail to agree upon reasonable terms and conditions the same shall be settled by arbitration or by the court. The precise terms and conditions for such trackage rights as so agreed upon or so settled shall be embodied in a written agreement, supplementary to this contract, between the City, acting by the Commission, the Lessee and the said Company or the Lessee, as such operator and lessee.

From Chapter IV of Part Third, entitled "Additions and Changes":

ARTICLE LXX. The principal object of the City in making this contract is to secure for the public convenience an adequate, comfortable and rapid system of passenger transportation in the portions of New York which will be served by the Railroad and the Existing Railroads. By the foregoing provisions of the Lease the Lessee has covenanted, among other things, to operate the Railroad and the Existing Railroads carefully and skillfully, according to the highest standards of railway operation; to supply adequate Equipment; to run trains so as to furnish adequate service; to use the best safety devices; to keep the Railroad, the Equipment, the Existing Railroads and the Existing Equipment, clean, dry, well lighted, heated and ventilated; and to do other things, as hereinbefore set forth, for the convenience and accommodation of the public. These covenants on the part of the Lessee are among the principal moving considerations to the City in making this contract, and any breach thereof will entitle the City to the remedies provided in this contract. • • •

Elevated Extension Certificate.

Executed March 19, 1913.

The Pertinent Parts Are Reprinted as Shown.

(Stipulation, Record 2020, item 4)

From the Opening Paragraphs, showing the Parties, etc.:

THE PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT does hereby certify as follows:

* * * * * * *

WHEREAS, since in the judgment of the Commission the public interest so demand, the Commission has fixed and determined the route or routes by which the Interborough Company may extend its railroad and has fixed and determined the location and plan of construction of the Railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the City by the Interborough Company, and such other terms, conditions and requirements as to the Commission appear just and proper; and

WHEREAS, this certificate has been approved by the Board of Estimate and the construction and operation of the Railroads hereby authorized have been consented to by the Board of Estimate and by the Mayor of the City.

NOW, THEREFORE, the Commission has authorized and does hereby authorize, but subject to the terms, con-

ditions and requirements hereinafter set forth, the Interborough Company—

To construct, maintain and operate, etc.

From the grant, specifying the term:

The authorizations or licenses hereby granted to construct, maintain and operate the Webster Avenue Line, the Eighth Avenue and 162d Street Connection, the Queensboro Bridge Line and the West Farms Subway Connection shall be held by the Interborough Company for a period of eighty-five (85) years from the date on which the Interborough Company shall first begin operation of any part of any of the Railroads, unless sooner terminated as hereinafter provided.

From Article VI, as to rate of fare:

The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the

Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) shall be deemed a continuous trip in the same general direction.

From Article IX, as to provision of trackage rights and through service:

The City also agrees to provide the Interborough Company with trackage rights over parts of the municipal railroads to be constructed and to be equipped, maintained and operated under a contract bearing even date herewith between the City and Interborough Rapid Transit Company and over any extensions of such parts and the Interborough Company as grantee under this certificate agrees to operate over such parts in conjunction with the Railroads to the end that through service may be provided over such parts over the Railroads and over the Manhattan Railroad.

From Article X, as to intention of the parties:

It is the intention of the Commission and the Interborough Company, and the foregoing Article shall be construed in accordance with such intention, that the City shall be afforded all proper and necessary means for safeguarding its right to one-half (½) of the excess of net profits of the Company Lines and for safeguarding its exercise of the right to terminate the authorizations or licenses hereby given. At the same time it is neither intended nor desired that the fair and ordinary discretion of the Interborough Company in the manage-

ment, construction, equipment, maintenance and operation of the Company Lines shall be interfered with.

From Article XII, as to compensation payable to the City of New York:

As compensation, the Interborough Company shall pay to the Comptroller for the period beginning on the day when any part of any of the Railroads is put into operation and ending on the day when the Interborough Company shall cease to operate the Railroads in conjunction with the Manhattan Railroad, (in which event the compensation shall be readjusted as hereinafter provided at the time such joint operation is discontinued) a sum which shall be determined as follows:

After the beginning of operation of any part of any of the Railroads, the net profits upon all elevated lines operated by the Interborough Company (the same including the Railroads, the existing Manhattan Railroad, and the railroads or additional tracks authorized by a certificate granted to the Manhattan Railway Company bearing even date herewith which taken together are referred to as Company Lines) in excess of the average annual net profits of the existing Manhattan Railroad for the two years, one ending June 30, 1910, and the other June 30, 1911, shall be ascertained and one-half (½) of the amount remaining of the said excess of net profits after deducting therefrom the rental for additional tracks (authorized by the Commission by certificate bearing even date herewith) shall be deemed to be the compensation payable to the City by the Interborough Company (in addition to said rental) under

this certificate; provided, however, that the total payment to the City under both certificates shall not be less than the amount of the aforesaid rental.

The said excess of net profits upon the Company Lines shall be ascertained as follows:

From any and all income, increase or profits from whatever source derived, either directly or indirectly, by the Interborough Company or on its behalf in any manner out of or in connection with the operation of the Company Lines (hereinafter referred to as the "revenue") the Interborough Company shall at the end of each quarter year ending December 31, March 31, June 30 and September 30, deduct:

(1) Taxes, if any, upon property actually and necessarily used by the Interborough Company in the operation of the Company Lines, together with all taxes and other governmental charges of every description (whether on physical property, stock, securities, corporate or other franchises or otherwise), assessed or which may hereafter be assessed against the Interborough Company in connection with, or incident to, the operation of the Company Lines. Also such assessments for benefits as are not properly chargeable to the actual cost of plant and structure or actual cost of equipment.

(2) Such rental, actually and necessarily payable by the Interborough Company for the Manhattan Railroad or for the use of property in connection with the Company Lines under contracts or leases approved by the Commission, as are not chargeable to operating expenses in the uniform system of accounts prescribed by the Commission, including rental for additional tracks under the said certificate bearing even date herewith.

(3) All expenses, exclusive of maintenance, actually and necessarily incurred by the Interborough Company in the operation of the Company Lines.

(4) An amount equal to twelve per centum (12%) of the revenue for the maintenance, exclusive of depreciation of the Company Lines. Said maintenance shall include the repair and replacement of tracks and also parts of continuous construction and parts of plant and structure and equipment units but shall not include the replacement of the principal parts of the plant and structure and equipment, as such principal parts are from time to time specified and defined by the Commission. If, in any quarter year such maintenance shall cost less than twelve per centum (12%) of the revenue the unexpended balance shall be transferred to the depreciation fund provided for in paragraph (5) of this article; and if, in any quarter year, such maintenance shall cost more than such twelve per centum (12%) of the revenue an amount equal to the excess may be withdrawn from or charged to such depreciation fund and applied to such maintenance.

(5) For the first year of operation an amount equal to two per centum (2%) of the revenue for depreciation of such portions of the Company Lines or their equipment as are not retired or replaced through the expenditures for maintenance provided for in paragraph (4) of this article. Within thirty (30) days after the 30th day of June following the beginning of operation and annually thereafter the Commission and the Interborough Company shall determine the amount of depreciation and excess maintenance not covered by the

amount set aside under the preceding paragraph during the preceding fiscal year, and the deductions for such year shall thereupon be adjusted to conform with such determination. If within such period the Commission and the Interborough Company are unable to agree upon the amount of depreciation during the preceding fiscal year, the amount thereof shall thereupon be determined by arbitration or by the court. The amount so determined shall be paid into a depreciation fund. Such fund shall be in the charge and under the control of the Depreciation Fund Board. The cost of all replacements of the principal parts (as such principal parts are from time to time specified and defined by the Commission) of the Company Lines and the equipment thereof due either to wear and tear or obsolescence, inadequacy or age and also any excess in the cost of maintenance as provided in paragraph (4) of this article shall be paid from this fund. When any principal part of the Company Lines or the equipment thereof is retired or withdrawn from service, an amount equal to its cost shall be withdrawn from this fund and expended on new equipment or new construction. Any salvage or proceeds on any part so retired or withdrawn shall be paid into this fund. Any amounts in such fund not currently needed for the purposes herein specified shall be securely invested and reinvested by the Depreciation Fund Board and all interest and profits accruing therein shall be returned to the revenue. The Depreciation Fund Board shall have the right to sell investments to meet current needs and for purposes of reinvestment. A permanent record of the depreciation of each class of construction and equipment (as such classes are from time to time

defined or specified by the Commission) shall be kept by the Interborough Company in the form prescribed from time to time by the Commission. At the expiration of the term or upon earlier termination as hereinafter provided, any amount in such fund accrued with respect to the plant and property of the Railroads shall be paid to the City or to a new grantee as may be directed by the Commission and the balance shall be paid to the Interborough Company.

(6) An amount to be retained by the Interborough Company equal to one-quarter (¼) of One Million Five Hundred and Eighty-nine Thousand Three Hundred and Forty-eight Dollars ($1,589,348) as representing the average net profits of the existing Manhattan Railroad for the two years, one ending June 30, 1910, and the other June 30, 1911, provided, however, that if it should hereafter be decided that either the Manhattan Railway Company or the Interborough Company is liable for the payment of the Federal corporation tax upon the sum distributable to the stockholders of the Manhattan Railway Company as a dividend, the aforesaid amount shall be reduced to the sum of One Million Five Hundred and Forty-seven Thousand Three Hundred and Fifty-one Dollars ($1,547,351).

(7) An amount equal to one-quarter (¼) of the annual interest payable by the Interborough Company upon the bonds issued to pay for the plant and property of the Railroads and of the plant and property of the railroads or additional tracks authorized by a certificate bearing even date herewith granted to the Manhattan Railway Company, together with a sum equal to one-

quarter of one per centum (¼ of 1%) upon such bonds, which latter amount shall be set aside and with interest and accretions promptly and securely invested and reinvested for the amortization of the actual cost of the said plants and properties. Such latter amount shall as promptly as possible be invested in bonds issued by the Interborough Company in connection with its obligations under this certificate and under the certificate bearing even date herewith for additional tracks. Such bonds shall be acquired at the lowest possible purchase price. Upon the completion of the amortization of such bonds the payments provided for in this paragraph shall cease and any balance in the Sinking Fund shall be paid into the revenue.

The Interborough Company shall also be entitled to deduct an amount equal to one-quarter (¼) of the interest actually and necessarily payable by the Interborough Company upon bonds issued by the Interborough Company with the approval of the Public Service Commission for the First District of the State of New York, for improvements to power house, substations, transmission lines and electrical apparatus required in connection therewith, now forming part of and supplying the Company Lines, which shall be necessary to provide additional power for the operation of the Railroads (including trackage rights) and the additional tracks authorized by certificate bearing even date herewith.

(8) When the Interborough Company shall provide additions (as the word additions is defined herein and in the certificate for the additional tracks bearing even

date herewith) to the Company Lines, or to the equipment thereof, then an amount to be retained by the Interborough Company equal to one-quarter (¼) of the annual interest payable by the Interborough Company (or, in the event that the Interborough Company should not borrow money for such purpose, then an amount equal to one-quarter (¼) of the interest at the average rate payable by the Interborough Company upon long term securities issued by it to carry out the purposes of this certificate) upon the actual cost of each additional item together with a sum equal to one-quarter of one per centum (¼ of 1%) of the actual cost of each additional item, which latter amount shall be set aside and with interest and accretions shall be promptly and securely invested and reinvested for the amortization of the cost of such additional item. Upon the completion of the amortization of the actual cost of any additional item the payments provided for in this paragraph in respect of such additional item shall cease and any balance in the sinking fund shall be paid into the revenue.

(9) After making all such payments the amount of revenue remaining shall be the excess of net profits.

If in any quarter year the revenue shall be insufficient to meet the various obligations and deductions referred to above, the deficits shall be accumulated and payment of such deficits shall be thereafter made before deducting the amounts required in the paragraph succeeding the paragraph for the payment of the obligation or deductions as to which there has been such deficit. Interest shall be payable upon such deficits at the

actual rate payable by the Interborough Company, or in the event that the Interborough Company should not borrow money for the purpose of paying such deficits then at the prevailing rate of interest payable by the Interborough Company for short term loans. Interest payable upon such deficits, if not paid semi-annually, shall be added to, and form a part of, the cumulative deficits.

From Article XVIII, as to interrelation of Certificate and Contract No. 3:

The Commission in view of this certificate and in conjunction therewith, has awarded or may award, subject to the approval of the Board of Estimate,

(1) to the Manhattan Railway Company, being the lessor of the Interborough Company, a certificate of even date herewith authorizing additional tracks on Second Avenue, Third Avenue and Ninth Avenue, mainly in the Borough of Manhattan, City of New York, and

(2) to the Interborough Company a contract under or in pursuance of which a rapid transit railroad may be in part constructed, and may be maintained and operated upon lines known respectively as Seventh Avenue-Lexington Avenue Line, Eastern Parkway Line, Steinway Tunnel Line and White Plains Road Line as in said contract described,

and certain consents are or may be necessary to be procured under the terms of such certificate in order that

the Manhattan Railway Company may have the right to construct, maintain and operate railroads therein described;

It is now agreed, therefore, that if said certificate or contract shall not take effect or if the Manhattan Railway Company shall be released from such certificate through failure to procure any such consents then this certificate hereby granted shall become null and void and the rights given hereby to the Interborough Company and all of its obligations hereunder shall cease and determine.

The Quinby Case.

[Reported in 223 N. Y. 244.]

In the Matter of the Application of HENRY D. QUINBY, individually and as Comptroller of the City of Rochester, et al., Appellants, for a Writ of Prohibition against the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE SECOND DISTRICT et al., Respondents.

(Argued March 25, 1918; decided April 5, 1918.)

[*246] APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1918, which affirmed, as matter of law, an order of Special Term denying, as matter of law, an application for a writ of prohibition.

The facts, so far as material, are stated in the opinion.

B. B. Cunningham, *Corporation Counsel*, for appellants.

William P. Burr, *Corporation Counsel* (*Terence Farley* and *Edgar J. Kohler* of counsel), for City of New York, intervening.

Richard C. S. Drummond, *Stewart F. Hancock*, *Boyd S. McDowell*, *Thomas H. Guy* and *August Merrill* for various cities of the state.

Ledyard P. Hale for Public Service Commission, respondent.

Warnick J. Kernan and *Daniel M. Beach* for New York State Railways, respondent.

James L. Quackenbush, Charles E. Hotchkiss and *Louis S. Carpenter* for New York Railways Company, intervening.

William L. Ransom and *Harry M. Chamberlain* for Public Service Commission for the first district.

[*253] POUND, J. The facts upon which the application for a writ of prohibition is based are as follows: The New York State Railways presented a petition to the public service commission of the second district praying that it be permitted to raise to six cents its rate of fare on street surface railways in the city of Rochester and a number of other cities. The city of Rochester filed objections to the jurisdiction of the public service commission to entertain such application. Its objections were based, *first*, on chapter 359, Laws of 1915, amending the charter of the city of Rochester and fixing a five cent rate for one ride over the road of any corporation operating a street surface railroad in such city, and *secondly*, upon the like terms and conditions contained in the franchise of the street railroad company as a condition of the consent of the local authorities thereto. Briefs were filed with the commission on behalf of the city of Rochester in support of its claim that the public service commission was without jurisdiction to entertain said petition of the New York State Railways, and oral argument was also made before the commission by the corporation counsel of the city.

In November, 1917, the public service commission made a decision in one of the cases (*Matter of Petition*

of Huntington R. R. Co., 14 Official State Dept. Reports, 305; *Matter of Application of N. Y. & N. S. Traction Co.*, 15 Official State Dept. Reports, 1, Jany. 10, 1918, *contra*) in which a petition for permission to increase rate of fare was presented to it, and held that the commission had the power to permit fares to be increased to an amount beyond five cents, notwithstanding the provision of section 181 of the Railroad Law, and also that it had power to permit fares to be increased beyond the rate fixed in a franchise granted by a municipality to a street railway company, and beyond the rate fixed in a contract existing between a municipality and a street railway com- [*254] pany. After such decision the public service commission decided to hear the Rochester case on the merits. The public service commission has thus assumed jurisdiction of the matter of the application of the New York State Railways for permission to increase its rate of fare in the city of Rochester to six cents.

In order to present the case before the public service commission it would be necessary for the city to have a valuation made of the property of the New York State Railways, and it would cost the city of Rochester not less than twenty-five thousand dollars to present its evidence before the commission.

A writ of prohibition will not lie in anticipation of the action of the commission if the commission has *jurisdiction* of the subject-matter and the only question is that of *power to grant the particular relief prayed for*. It is an extraordinary remedy for unusual cases. (*People ex rel. Karr v. Seward*, 7 Wend. 518; *People ex rel. Bean* v. *Russell*, 49 Barb. 351; *People ex rel. Ballin* v. *Smith*, 184 N. Y. 96; *People ex rel. Patrick* v. *Fitz-*

gerald, 73 App. Div. 339; *People ex rel. Oakley* v. *Petty*, 32 Hun, 443.) In *Matter of Metz* v. *Maddox* (189 N. Y. 460) the sole question before this court was the constitutionality of chapter 538, Laws of 1907, providing for a recount of ballots cast in the McClellan-Hearst mayoralty contest of the year 1905, and the suitability of the procedure was not passed upon. The point that prohibition is not the proper remedy here is raised only by the intervening public service commission of the first district and the real parties are content to have this appeal disposed of on the merits.

We are, therefore, led to the inquiry: What is the jurisdiction of the commission over rate regulation? The New York State Railways operates in the second public service district, which comprises all counties except those in Greater New York. (Public Service [*255] Commissions Law [Cons. Laws, chap. 48], § 3.) It is a street railroad corporation within the meaning of that term as used in the Public Service Commissions Law (Public Service Commissions Law, § 2, subd. 7). The term "common carrier" includes street railroad corporations. (Public Service Commissions Law, § 2, subd. 9.) Section 5 of the Public Service Commissions Law, after providing that the public service commission for the first district (Greater New York) shall have jurisdiction over common carriers operating within that district, provides as follows (Public Service Commissions Law, § 5, subd. 3):

"3. All jurisdiction, supervision, powers and duties under this chapter not specifically granted to the public service commission of the first district shall be vested

in, and be exercised by, the public service commission of the second district, including the regulation and control of all transportation of persons or property, and the instrumentalities connected with such transportation, on any railroad other than a street railroad from a point within either district to a point within the other district."

Section 181 of the Railroad Law (Cons. Laws, ch. 49), so far as material here, is as follows:

"No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village.

"* * * *The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the* [*256] *public service commission shall possess the same power, to be exercised as prescribed in the public service commissions law.*"

Subdivision 1 of section 49 of the Public Service Commissions Law is in part as follows:

"§ 49. Rates and service to be fixed by the commission. 1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded,

exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, *or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies,* determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

It is clear that the New York State Railways, which operates in the city of Rochester and other cities of the [*257] state of New York outside the first district, is within the jurisdiction of the public service commission for the second district, and that such commission possesses some general jurisdiction to deal with the subject

of regulating the rate of fare to be charged by the street railroads in the second district.

We must next consider whether this jurisdiction is limited.

1. By the charter amendment (L. 1915, ch. 359, § 7), fixing a five-cent fare in the city of Rochester, which reads as follows:

"A corporation operating a street surface railroad must not charge any passenger more than five cents for one continuous ride from any point on its road to any other point thereon, within the limits of the city of Rochester. In case two corporations operate separate street surface railroads which connect or intersect in the city of Rochester, such corporations must not charge any passenger more than five cents for one continuous ride from any point on one road to any point on the other road, within the limits of the city of Rochester. In either of the above cases a transfer must be issued to a passenger when necessary for such passenger to transfer from one car to another, in order to complete one continuous ride. If two corporations affected by the provisions hereof cannot agree as to the method of division between them of fares collected, such method of division must be settled by the public service commission of the second district of the state of New York. The word 'road' as used in this section includes all street surface railroads, lines and branches operated by one corporation, those leased by it and those under its control."

The policy of the state is said to be that the public service commission should deal with the regulation of

[*258] rates of fare charged by railroad corporations without limitation or restraint, and with the power to increase as well as decrease such rates. (*People ex rel. N. Y. & N. S. Traction Co.* v. *Public Service Com.*, 175 App. Div. 869; *People ex rel. Ulster & D. R. R. Co.* v. *Public Service Commission*, 171 App. Div. 607, 611; affd., 218 N. Y. 643).

The case last cited had to do exclusively with statutory mileage book rates and it has not been held by this court that the commission has power to raise ordinary rates of fare above the rate fixed by statute. The point was expressly saved for future consideration. "We are now simply dealing with the question of reduced rates to which those words ('notwithstanding that a higher rate, fare or charge had been heretofore authorized by statute') clearly do not apply," said COCHRANE, J., in the *U. & D. Case* (*supra*) and his opinion was adopted by this court. But he also said that maximum statutory charges were to be considered and raised if insufficient, and the only reasonable construction of section 49, subdivision 1, is that when the maximum charges fixed by statute do not yield reasonable compensation for the service rendered the commission may raise the rate. The words "notwithstanding that a *higher* rate, charge or fare has heretofore been authorized by statute" are not entirely apt, but the section, read as a whole, is susceptible of no other natural interpretation than that the legislature has, for greater certainty, expressly included in its general delegation of powers, the power of the commission to reduce a maximum rate *fixed by the legislature*. The purpose of the legislation was to provide for the regulation of statutory fares by a board

which may be expected to pass equitably upon conflicting claims with its single purpose the common good, even where a maximum rate had been fixed by the legislature.

The case of *Willis* v. *City of Rochester* (219 N. Y. [*259] 427) merely upheld the charter amendment as a constitutional exercise of the legislative power to fix rates. Rates so fixed by special statute are still subject to regulation by the public service commission. The jurisdiction of that body over such rates is not to be reduced by implication. The legislature merely fixed the rate *pro tempore*.

We have still to consider whether jurisdiction is limited,

2. By the fact that the consent of the local authorities was given on condition as to rates of fare.

The Constitution, article III, section 18, as it was amended in the year 1875, provides:

"But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, *and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained*, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested,

whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

The power of the local authorities to impose as a condition to giving consent to the construction and operation of a street railroad that a stipulated rate of fare should be charged has been repeatedly upheld. (*People ex rel. West Side St. R. Co.* v. *Barnard*, 110 N. Y. 548; *Kittinger* v. *Buffalo Traction Co.*, 160 N. Y. 377, 391, 392; *Public Service Commission* v. *Westchester St. R. R. Co.*, 206 N. Y. 209; *People ex rel. Frontier Elec. Ry. Co.* v. *City of North Tonawanda*, 70 Misc. Rep. 91; *Allegheny* [*260] *City* v. *Millville, A. & S. S. Ry. Co.*, 159 Pa. St. 411.) But these cases dealt with the question of local power over the corporation and not with the question of general legislative power over the municipality. The question presented is this: The consent of the local authorities being obtained, what jurisdiction has the legislature conferred upon the public service commission to regulate rates by increasing the rate agreed upon without such consent? Again it is urged that its jurisdiction is plenary; that "a municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. * * * The city is the creature of the State" (*City of Worcester* v. *Worcester Con. St. Ry. Co.*, 196 U. S. 539, 548); that rate regulation is a matter of the police power of the state and, therefore, contracts may be affected by its exercise without impairing their obligation (*Louisville & N. R. R. Co.* v. *Mottley*, 219 U. S. 467, 485; *Texas*

& N. O. R. R. Co. v. *Miller*, 221 U. S. 408, 414; *Buffalo E. S. R. R. Co.* v. *Buffalo Street R. R. Co.*, 111 N. Y. 132); that the power to regulate rates has not been irrevocably surrendered to the local authorities by the constitutional requirement that the consent of such authorities is requisite; that no immunity from the exercise of governmental power has been transferred to the municipalities, save only that their naked consent is requisite; that if conditions may validly be imposed upon such consent by the localities in the beginning they are subject to alteration or repeal at the legislative will; that as the state cannot be fully sovereign without full legislative power, such power is not deemed to be abridged. (*City of Rochester* v. *Rochester Ry. Co.*, 182 N. Y. 99; affd., 205 U. S. 236; *Portland Ry., L. & P. Co.* v. *City of Portland*, 201 Fed. Rep. 119, 125.) It has been held that the legislature may, by virtue of its general power over municipalities, regulate the mode and manner in [*261] which the consent of the local authorities to the construction and operation of street railroads shall be given, and may regulate and limit by statute the conditions upon which it may be given. (*Matter of Thirty-fourth St. R. R. Co.*, 102 N. Y. 343; *Beckman* v. *Third Ave. R. R. Co.*, 153 N. Y. 144, 152; *People ex rel S. S. Traction Co.* v. *Willcox*, 196 N. Y. 212.) Regulations are so made in certain cases by the Railroad Law, section 173, but that section expressly provides that nothing therein contained shall be construed as modifying or affecting the terms of the contract between the city of Rochester and the street railroad, and it looks to the future and does not attempt to regulate consents already granted. The Constitution does not

expressly provide that the municipality may irrevocably establish rates for the entire period of a franchise, and it has been held invariably and in a legion of cases that such power to establish rates is not essential to the consent of local authorities and will not be implied and that the legislature is at all times supreme in the matter. (*Home Telephone & Tel. Co.* v. *City of Los Angeles*, 211 U. S. 265; *Arlington Board of Survey* v. *Bay State St. Ry. Co.*, 224 Mass. 463; *State ex rel. Webster* v. *Superior Court*, 67 Wash. 37; L. R. A. 1915, C 287; *State ex rel. M. S. R. R. Co.* v. *P. S. C.*, 168 S. W. Rep. 1156; *City of Manitowoc* v. *M. & N. Traction Co.*, 145 Wis. 13; *City of Dawson* v. *Dawson Tele. Co.*, 137 Ga. 62; *City of Woodburn* v. *Pub. Service Commission*, 82 Ore. 114; L. R. A. 1917, C 98; *Collingswood Sewerage Co.* v. *Borough of Collingswood*, 91 N. J. L. 20.) In all such cases, the question was one of unrestricted legislative power, policy and discretion over a city or town where the local authorities were held to be mere instrumentalities through which the state exercised its sovereign power. The paramount power of the legislature over the subject of fares was upheld in the absence of a constitutional limitation. But our Con- [*262] stitution, by requiring the consent of the local authorities, recognizes that our municipalities are *pro tanto* independent of legislative control, exercising some fragment of power, otherwise legislative in character, which has been thus irrevocably transferred by the fundamental law from the legislature to the locality. The grant by the municipality of authority to use the streets is not a mere privilege or gratuity. Once accepted, it becomes a contract which neither the state nor its agencies can impair. (*People* v. *O'Brien*, 111 N. Y. 1.) And it is

urged by the appellant that the franchise and the conditions upon which the consent of the local authorities are obtained are inseparable; that the very right of the railroad to operate depends upon its compliance with the obligation to keep such conditions (*Matter of N. Y. E. Lines Co. v. Empire City Subway Co.*, 201 N. Y. 321, 329; affd., 235 U. S. 179); that it would be a vain thing if the consent were placed under the protection of the Constitution, and the conditions which induced such consent were immediately subject to extinguishment by the legislature for that would mock the very purpose of the constitutional provision and permit almost any interference by the legislature; that the local authorities in this matter are supreme over the public service commission by virtue of the Constitution; that the obligation of a street surface railroad to carry passengers for an agreed fare may in a constitutional sense be neither a contract nor private property, but it is imposed by virtue of a delegated power, delegated by the people—not by the legislature—to the local authorities, and is thus beyond legislative recall; that when any right is expressly protected by the Constitution the police power may not be exercised to impair its validity (*People v. Gillson*, 109 N. Y. 389, 400); and that the public service commission, therefore, has no jurisdiction over the subject-matter of rate regulations in the city of Rochester because the legislature [*263] has no power to alter the rates fixed by consent of the company and the local authorities.

It is, however, unnecessary and, therefore, improper to decide at this time what the limits of legislative power are in this connection. The delegation of legislative power to commissions and other administrative officers

and boards need not be assumed if the general words from which such delegation may be inferred are not reasonably so construed.

In the absence of clear and definite language conferring without ambiguity jurisdiction upon the public service commission to increase rates of fare agreed upon by the street railroad and the local authorities we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter, whatever its powers may be. The Public Service Commissions Law (§ 26, § 49, subd. 1) and the Railroad Law (§ 181) deal with maximum rates of fare established by statute but make no reference in terms to rates established by agreement with local authorities.

In regulating rates three courses were open to the legislature: 1. To prescribe rates itself. 2. To delegate the power to the commission. 3. To leave the matter to agreement between the street railroad company and the local authorities. It has constitutionally conferred on the public service commission certain functions (*Matter of Trustees of Village of Saratoga Springs* v. *Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123), which plainly include the power to regulate rates fixed by statute, and while it may be said that it has undertaken to delegate to the public service commission *"the same power" that it has* to regulate rates of fare (Railroad Law, § 181) it is impossible to find a word in the statutes which discloses the legislative intent to deal with the matter of rates fixed by agreement with local authorities. As it has often been held [*264] in connections other than that of legislative power over them that such agreements are valid, it may

well be inferred that the legislature excluded them from consideration by failure to mention them and that it has made no attempt to turn them over to the public service commission for revision. "Statutes should be read according to the natural and most obvious import of the language, without resorting to artificial or forced constructions, for the purpose of either limiting or extending their operation." (*Matter of N. Y. & Brooklyn Bridge*, 72 N. Y. 527, 529; *Heerwagen* v. *Crosstown St. Ry. Co. of Buffalo*, 179 N. Y. 99.) "A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." (*Riggs* v. *Palmer*, 115 N. Y. 506, 509; *McDonnell* v. *Sheehan*, 129 N. Y. 200, 206.) The authority of the commission to regulate rates in such cases and thus to extinguish an undoubted power of the local authorities should fairly appear before it is assumed to exist.

It follows that the public service commission is without jurisdiction; that prohibition is the proper remedy; that the order appealed from should be reversed and that an absolute writ of prohibition be awarded to relators, with costs to appellants in all courts.

CRANE, J. (concurring): I concur. I am of the opinion that the reserve police power of the legislature has not been contracted away. I concur in the above opinion in so far as it states that the legislature has not in this instance given to the public service commission the power of regulation.

CUDDEBACK, CARDOZO and ANDREWS, JJ., concur with POUND, J., and CRANE, J., concurs in memorandum; HISCOCK, Ch. J., and COLLIN, J., dissent.

Order reversed, etc.

The Glens Falls Case.

[Reported in 225 N. Y. 216.]

[*216]

THE PEOPLE OF THE STATE OF NEW YORK ex rel. VILLAGE OF SOUTH GLENS FALLS, Respondent, v. PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Defendant, and UNITED GAS, ELECTRIC LIGHT AND FUEL COMPANY, Appellant.

[*217] (Argued November 12, 1918; decided January 7, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 18, 1918, which reversed, on certiorari, a determination of the public service commission, second district, dismissing the relator's complaint against the United Gas, Electric Light and Fuel Company, and referred the matter back to the commission for action thereon in accordance with the prayer of the complaint.

The facts, so far as material, are stated in the opinion.

Erskine C. Rogers for appellant.

[*218] *L. B. McKelvey* for respondent.

CRANE, J. In September of 1900 the village of South Glens Falls, New York, granted to the United Gas, Electric Light and Fuel Company the right and power to use the streets within the village for the purpose of maintaining pipes and necessary feeders for lighting, fuel and other [*219] purposes for which gas may be used. The right was for the term of fifty years.

It was provided that in consideration of this license the said company should charge no greater sum than one dollar and twenty-five cents ($1.25) per thousand cubic feet for the use of gas for illuminating or fuel purposes.

The gas company established its plant in said village under this franchise and thereafter furnished gas to the inhabitants in accordance with its terms and conditions.

It appeared without contradiction that during the past five and one-half years the price of coal in the open market advanced 120% and at contract price approximately 74.6%; that the cost of manufacturing labor advanced 55.5% and that the taxes assessed against the company increased 37.6%, resulting in a cost to the company for delivery of gas at the consumers' burner in said village of $1.7594 per thousand cubic feet.

In August of 1917 the gas company increased its rate to one dollar and sixty cents ($1.60) per thousand cubic feet.

Thereupon and in January, 1918, the village of South Glens Falls made complaint under section 71 of the Public Service Commissions Law (Cons. Laws, ch. 48) asking the commission for the second district to investigate the case and prohibit and restrain the gas company from raising its rates above one dollar and twenty-five cents ($1.25) per thousand cubic feet. It was alleged in the complaint that the franchise granted to the company in 1900 constituted a valid and binding contract and that the company could not for the term of fifty years increase its rate above said figure.

On the hearing before the commission the village through its counsel waived all question as to the reasonableness of the increase and stated that the only question presented was whether the franchise was such a binding contract that it could not be abrogated in any way by [*220] the gas company or by the public service commission. The latter body determined that it had power to regulate the rate to be charged for gas irrespective of the franchise of 1900 and dismissed the complaint. Upon review of these proceedings by the Appellate Division that court reversed the order of the commission and decided in effect that the public service commission had no power over the matter and granted the demand of the village that the company should be prohibited from charging more than the rate fixed in 1900.

The question is now presented to us as to whether the public service commission has power under the circumstances mentioned to regulate the price of gas. As the public service commission has only such authority as is given by the legislature of the state, the question resolves itself into two parts, *first*, has the legislature such power, and, *second*, has it conferred the power upon the public service commission.

The right which the village had to annex terms to its license given in 1900 to the gas company is to be found in article VII, section 61, subdivision 1, of the Transportation Corporations Law (Cons. Laws, ch. 63). This gives to gas companies the power "to lay conductors for conducting gas through streets * * * in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe."

Some of my associates are of the opinion that in view of the changes which naturally come with time in civic life the fixing of a given rate by a village for a period of fifty years was not a reasonable regulation within the terms of the above statute. However this may be, much broader principles are here involved which we feel called upon to decide.

Has the legislature the power to fix and regulate the price at which this gas company shall furnish gas to the [*221] inhabitants of the village of South Glens Falls? In the first place we must note the distinction between a contract made by a gas company to furnish the municipality *itself* with light and the terms and conditions upon which a municipality grants a franchise to furnish gas to its *inhabitants*. In the first instance the arrangement may be a contract pure and simple protected by the Constitution both federal and state from subsequent abrogation even by the legislature unless such power be reserved. Such was the case of *Kings County Lighting Company* v. *City of New York* (176 App. Div. 175; affd., 221 N. Y. 500). There the town of New Utrecht in December of 1889 made an agreement with the Kings County Gas and Illuminating Company for lighting the streets of New Utrecht for a term of ten years, extended to twenty-five by the legislature, at a rate of twenty-eight dollars ($28) per street lamp. New Utrecht was thereafter merged into the city of New York. By the Laws of 1905, chapter 736, it was provided that a corporation selling gas to the city of New York should not charge in excess of seventy-five cents ($.75) per one thousand cubic feet. The city succeeding to the liabilities of the town refused to pay the gas bills by virtue of this latter

act, but it was said that any construction of the act of 1905 which would dissolve the obligation to the contract would be open to the charge of violating section 10 of article I of the Federal Constitution.

But the regulations regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations cannot be said to form contracts beyond the inherent police power of the legislature to modify for the public welfare. Reason dictates that such arrangements could not be contracts falling within the constitutional provisions against abrogation. Assume that a village has granted to a corporation a franchise to use its streets for gas or electricity under a [*222] rate which is reasonable for the conditions as they exist at the time, but which, as the village has grown into a city, is exorbitant and excessively profitable to the corporation. Reduction in the rate by the legislature so as to be reasonable to the consumer and profitable to the corporation would seem to be well within the police power of the legislature. Reduction in rates seems to be generally recognized as a public benefit, and yet an increase may be equally so. The terms and conditions upon which a village may permit a public service corporation to use its streets may prove unsafe, unhealthy and extremely improper, as the community expands and grows. New inventions and contrivances in common use may necessitate a change. To say that such conditions were beyond the legislative control would bind the public to the facilities of our forefathers and be contrary to the numerous statutes which have been passed and recognized as legal requiring service corporations to change their plants. Thus the present Public

Service Commissions Law relating to gas corporations, section 66, provides that the commission shall have power to order such reasonable improvements as will best promote the public interests, preserve the public health and protect those using gas and those employed in the manufacture and distribution thereof.

If a village, as a condition of granting a franchise, should specify the kind of pipes and the particular method of service which the company should provide, could it be said that when these conditions proved unsafe to the public the legislature could not order improvements because the franchise was a contract beyond abrogation? The same reasoning applies to rates of service. Change in conditions, in equipment, in the process of manufacture or in the manufactory itself to meet modern conditions costs money, and yet this cost should not be considered if the health and safety of the public demand a change. [*223] A reasonable increase in rates in order to provide the money for these changed conditions is as much a benefit to the public as a reduction in rates when the charge is excessive. It is a bad political economist who thinks the public is always served best by that which is cheap.

The authorities also sustain this view of the law. A municipal corporation is simply a political subdivision of the state and exists by virtue of legislative enactments. Rate regulation is a matter of the police power of the state and the terms and conditions such as here in question contained in a franchise to a service corporation may be modified without impairing the obligation of a contract within the provisions of the Constitution. (*Louisville &*

N. R. R. Co. v. *Mottley*, 219 U. S. 467, 480, 482; *Texas & N. O. R. R. Co.* v. *Miller*, 221 U. S. 408, 414; *Buffalo E. S. R. R. Co.* v. *Buffalo Street R. R. Co.*, 111 N. Y. 132; *City of Rochester* v. *Rochester Ry. Co.*, 182 N. Y. 99; affd., 205 U. S. 236; *Portland Ry., L. & P. Co.* v. *City of Portland*, 201 Fed. Rep. 119, 125.)

The second question is this: The legislature having power to regulate charges of this gas company to the consumers of the village of South Glens Falls, has it conferred this power upon the public service commission? Chapter 480 of the Laws of 1910, known as the Public Service Commissions Law, would seem to give this power. Subdivision 5 of section 66 reads:

"Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished notwithstanding that [*224] a higher rate or charge has heretofore been authorized by statute."

Section 72 provides:

"An investigation may be instituted by the commission as to any matter of which complaint may be made, as provided in section seventy-one of this chapter, *or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it.* After a hearing and after

such an investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished. * * *"

No statute has fixed the price of gas for this community. It seems quite clear to us, therefore, that the legislature having the power to regulate the charge to be made for gas by the United Gas, Electric Light and Fuel Company to the residents of the village of South Glens Falls has conferred this power by reason of the above provisions of law upon the public service commission and their action in dismissing the village's complaint was correct.

The Appellate Division based its decision upon the authority of *Matter of Quinby* v. *Public Service Comm.* (223 N. Y. 244). This case is not inconsistent or contrary to what is here stated. The matter there at issue was a railroad rate fixed by a city charter and contained in the street franchise to the company. We held that in view of article III, section 18, of the Constitution requiring the consent of the local authorities to the construction of a railroad that the power given to the public service commission to modify this rate should be distinctly and expressly conferred and that such power had not been given. It was said:

"In the absence of clear and definite language conferring without ambiguity jurisdiction upon the public [*225] service commission to increase rates of fare agreed upon by the street railroad and the local authori-

ties we should not unnecessarily hold that the legislature has intended ot delegate any of its powers in the matter, whatever its powers may be. The Public Service Commissions Law (Section 26, section 49, subd. 1) and the Railroad Law (Section 181) deal with maximum rates of fare established by statute but make no reference in terms to rates established by agreement with local authorities" (p. 263).

The question as to the power of the legislature to deal with such rates was specifically reserved and not decided. The opinion clearly intimated that such power did exist.

For the reasons here stated the order of the Appellate Division should be reversed and that of the public service commission dismissing the complaint affirmed. Costs to the appellant in this court and in the Appellate Division.

McLAUGHLIN, J. (concurring). I concur in the result reached by Judge CRANE.

The right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity. It may be exercised by the state, or through a commission appointed by it; or it may delegate such power to a municipality. The delegation of this power, however, is never implied since the effect is to extinguish, no matter for how short a time, *pro tanto* a power of the state. Therefore, when delegated its existence and the authority to make it must clearly and unmistakably appear. (*Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244.) Every doubt must be resolved in favor of the continuance of the power in

the State. (*Home Telephone & Telegraph Co.* v. *Los Angeles*, 211 U. S. 265; *Wyandotte County Gas Co.* v. *Kansas*, 231 U. S. 622.)

[*226] Our attention has been called to no provision in the charter of the village of South Glens Falls by which it is claimed the power was given to such village to fix the maximum rate at which gas should be sold to consumers. It may be assumed that the charter gave to the village the right to make certain contracts necessary for its corporate existence, but this power did not include the right to make a contract fixing the rate at which gas should be sold to the public. When the franchise was granted to the United Gas, Electric Light and Fuel Company, both it and the village were bound to take notice of the right of the state to step in at any time and fix a rate other than that stated in the franchise. The legislature by the creation of the public service commission delegated to that body the power to fix a rate, and this it may exercise whenever it sees fit to do so notwithstanding the provision of the franchise fixing the maximum price for a term of fifty years. The act of the village and the gas company in thus contracting, while it may have been binding upon the parties to it, had no effect upon the power of the state acting through the public service commission to which has been delegated all the power the state has in fixing rates at which gas can be sold to the public. The whole act creating the public service commission indicates as clearly as language can that the legislature intended to give to that body all the power necessary to fix a rate at which gas could be sold throughout the state. Thus article 1, section 4, of the Public Service Commissions Law provides that the

commission shall possess the powers and duties specified in the act but "also all powers necessary or proper to enable it to carry out the purposes of this chapter." Article 4, section 66, subdivision 5, provides that "whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such [*227] person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges." And article 4, section 72, provides that after the hearing and after such investigation as shall have been made by the commission or its officers or agents "the commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; * * *. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question. * * *"

It is true that in article 7, section 61, subdivision 2, of the Transportation Corporations Law (L. 1909, ch. 219) the right of a public service corporation to lay conductors for conducting gas through the streets of a city or village is given, but this right cannot be exercised without the consent of the municipal authorities "under such reasonable regulations, as they may prescribe." "Reasonable regulations" does not include the right to fix a rate so that the state cannot interfere and fix a different one. (*Wyandotte County Gas Co.* v. *Kansas*,

supra; Portland R., L. & P. Co. v. *City of Portland,* 201 Fed. Rep. 119; *City of Benwood* v. *Public Service Commission,* 75 W. Va. 127; *Milwaukee Electric R. & Lt. Co.* v. *Railroad Commission,* 153 Wis. 592. See, also, *People ex rel. N. Y. & N. S. T. Co.* v. *Public Service Commission,* 175 App. Div. 869; *People ex rel. Bridge Operating Co.* v. *Public Service Commission,* 153 App. Div. 129.) If this view be correct, then it necessarily follows that there is at the present time lodged in the public service commission the power to fix a rate at which gas shall be sold by the appellant.

[*228] But it is urged that this view is in conflict with the one expressed in *Matter of Quinby* v. *Public Service Commission* (*supra*). I do not think so. On the contrary it seems to me that case is clearly distinguishable. There the question presented related to rates of a street surface railroad operating in the city of Rochester. Before the railroad company occupied the streets of the city it had to obtain the consent of the municipal authorities. The Constitution, as amended in 1875, so provided (Article 3, section 18). The consent was obtained but only on condition that the rate for one continuous ride should not exceed five cents per passenger. The condition thus imposed was accepted and the franchise granted by the city in 1890. In 1894 another contract was entered into between the city and the railroad company which ratified and confirmed the contract of 1890 as well as all ordinances relating to it. This contract was expressly recognized by the legislature in paragraph 173 of the Railroad Law (L. 1910, ch. 481); and in section 181 of the same law a provision was inserted which prohibits a railroad operating in any

incorporated city or village from charging any passenger more than five cents for a continuous ride. In 1915 the legislature amended the charter of the city of Rochester and added a new section which provides that all street surface railroads operating cars in the streets of the city should not charge more than five cents per passenger for each continuous journey. In view of the constitutional provision requiring the consent of the local authorities, the agreement as to the maximum fare to be charged as a basis of the consent, the legislative recognition of the contract, and the act of 1915 fixing the maximum rate at five cents, this court held that it did not find in the Public Service Commission Law that the state had delegated to the public service commission the power to increase the rate in excess of that agreed upon between the railroad company and the local [*229] authorities, and that if the legislature had so intended then such intent should have been expressed in "clear and definite language."

In the present case there was no constitutional provision requiring the consent of the local authorities before the streets of the village could be occupied by the gas company. There has been no legislative recognition of the terms imposed as a condition of granting the franchise. No statute has been enacted fixing the maximum price at which gas can be sold. And it does appear from the Public Service Commissions Law that the legislature intended to and has given the commission the power either to increase or to decrease the price at which gas shall be furnished to the public.

The distinction thus made is not fanciful. It is real. It is substantial. In the *Quinby* case the intent on the part of the legislature to delegate the power to fix a rate could not be found, and there was a fair inference, at least, from legislative acts that such power had not been given but was retained by the state. In the present case the intent does appear. The statute creating the public service commission indicates as clearly as language can that the legislature intended to give to the commission all the power necessary either to increase or to diminish rates at which gas should be sold.

Entertaining these views I am of the opinion that the order of the Appellate Division should be reversed, etc.

CHASE, J. (dissenting). This court decided in the *Quinby* case (*Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244) that it was not the intention of the legislature by the Public Service Commissions Law to confer upon the public service commissions jurisdiction and power to raise the rate of fare that can be charged by a street railroad corporation to an amount in excess of the amount at which it had been expressly [*230] limited by agreement between the street railroad corporation and the local authorities of the municipality in which the corporation is maintaining its road. In doing so, this court say: "In the absence of clear and definite language conferring without ambiguity jurisdiction upon the public service commission to increase rates of fare agreed upon by the street railroad and the local authorities we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter, whatever its powers may be."

The decision in that case was confined to holding that the legislature did not intend to delegate its power, if any, relating to the increase of rates of fare of street railroads so agreed upon, to the public service commissions. Whether the legislature has the power, directly or by delegation to the commissions, to increase the rates of fare so agreed upon, was not passed upon in that case.

The case now before us involves a gas corporation and a price to be charged for gas in excess of a maximum price fixed and determined upon as a consideration for granting a franchise to the appellant by the local authorities and not an increase in the rate of fare to be charged by a street railroad corporation in excess of an amount fixed by a similar agreement. It is now sought to have this court hold that although the legislature did not intend to confer jurisdiction and power on the public service commissions to increase rates of fare agreed upon between street railroad corporations and the local authorities, it was the intention of the legislature to confer jurisdiction and power on such commissions to increase the price of gas similarly agreed upon between a gas company and the local authorities.

If such decision is to be made the difference of intention should be found in the act in "clear and definite language."

I do not find any substantial basis on which to distinguish the decision in the *Quinby* case to permit of [*231] making a different decision in this case. The general power of the public service commissions relating to a gas corporation is the same as that relating to a street railroad corporation.

The Public Service Commissions Law provides that the public service commission for each district shall possess the powers and duties in the act specified, and also, "All powers necessary or proper to enable it to carry out the purposes" of the act. (Sec. 4.)

The Public Service Commissions Law (§ 26, § 49, subd. 1) and the Railroad Law (§ 181) deal with maximum rates of fare established by statute but make no reference in terms to rates established by agreement with local authorities. (*Matter of Quinby v. Public Service Commission, supra.*) The same is true of the Public Service Commissions Law (§ 66, § 71 and § 72) and the Transportation Corporations Law (§ 61).

In this case as in the *Quinby* case the question involved is the jurisdiction of the public service commissions to grant the particular relief to which the corporation involved deems itself entitled. The reasonableness of the rate of fare or of the price of gas to which the corporations respectively deem themselves entitled, has not been controverted in either case.

A comparison of the provisions of the Public Service Commissions Law relating specially to the power of the commissions over rates of fare to be charged by street railroad corporations, with those specially relating to such power over the price to be charged for gas, will show that the legislature did not clearly or otherwise express a different intention about the power of the commissions relating thereto. Section 49 specially relating to rates of fare to be charged by street and other railroad corporations is as follows:

"1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a com- [*232] plaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. • • •"

The sections specifically relating to the price to be charged for gas are as follows:

"* * *. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges [*233] thereafter to be in force for the service to be furnished notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed; * * *." (§ 66, subd. 5.)

"Upon the complaint in writing of the mayor of a city, the trustees of a village or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of such gas or electricity in cities of the first or second class, or of not less than fifty in cities of the third class, or of not less than twenty-five elsewhere, or upon complaint of a gas corporation or electrical corporation supplying said gas or electricity, as to the illuminating power, purity, pressure or price of gas, * * *, the proper commission shall investigate as to the cause of such complaint. * * *." (§ 71.)

"Before proceeding under a complaint presented as provided in section seventy one, the commission shall

cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made, as provided in section seventy-one of this chapter, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it. After a hearing and after such an investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such [*234] corporation or person, for the service to be furnished; and may order such improvement in the manufacture, distribution or supply of gas, in the manufacture, transmission or supply of electricity, or in the methods employed by such person or corporation, as will in its judgment be adequate, just and reasonable. The price fixed by the commission under this section or under subdivision five of section sixty-six shall be the maximum price to be charged by such person, corporation or municipality for gas or electricity for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years except in the case of a sliding scale, and thereafter until the commission shall, upon its own motion or upon the complaint of any corporation, person, or municipality interested, fix a higher or lower maximum price of gas or electricity to be there-

after charged. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies." (§ 72.)

Where the maximum rate of fare on street railroads and the price of gas have each been fixed by agreement with local authorities the public service commissions are equally restricted in their power and jurisdiction on their own motion or on complaint to authorize an increase of the same.

It is suggested that no statute has fixed the price of gas in South Glens Falls. It is for the reason that the price of gas has been fixed by agreement with the local authorities that the question involved on this appeal is controlled by the decision in the *Quinby* case. The [*235] decision in that case was expressly placed upon the ground that authority is not given to the commission by the legislature to increase the amount of fare then in controversy above the maximum amount agreed upon as a condition of granting the railroad franchise.

It is also suggested that the constitutional provision (Constitution State of New York, art. 3, section 18) providing for the consent of certain owners of property and of the local authorities before a law shall authorize the construction of a street railroad, gives the commissioners greater power over the fare to be charged

by a street railroad corporation than it has over the price to be charged for gas by a gas corporation.

The Constitution provides: "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

The constitutional provision prohibits any law authorizing the construction or operation of a street railroad except upon the condition therein stated but it does not in any way prescribe or limit the fare to be charged by a street railroad corporation. It does not in any way affect the question now before us relating to the power of the public service commission to increase the maximum rate of fare to be charged by a street railroad corporation, [*236] or the prices of gas to be charged by a gas corporation, over and above the amount agreed upon by the street railroad or gas company respectively and the municipality.

The decision in the *Quinby* case stands upon the words that I have quoted herein. It does not depend upon the constitutional provision. It is not affected by the constitutional provision unless perchance we reason as did the appellant in that case as recited in the opinion of Judge POUND as follows: "It would be a vain thing if the consent were placed under the protection of the Constitution, and the conditions which induced such consent were immediately subject to extinguishment *by the legislature* for that would mock the very purpose of the constitutional provision and permit almost any interference by the legislature; that the local authorities in this matter are supreme over the public service commission by virtue of the Constitution; that the obligation of a street surface railroad to carry passengers for an agreed fare may in a constitutional sense be neither a contract nor private property, but it is imposed by virtue of a delegated power, delegated by the people—not by the legislature—to the local authorities, and is thus beyond legislative recall." (p. 262.)

It was the contention of the appellant in that case that the legislature has no power in any case to increase rates of fare agreed upon by a street railroad and the local authorities. That question, I repeat, was not decided in that case. The language last above quoted was not adopted by the court or by the writer of the opinion.

Both cases should, in my judgment, stand upon the language quoted from the *Quinby* opinion to the effect that the legislature did not intend to delegate its power in cases where the rates of fare or price of gas have

been established by and between the street railroad or gas companies respectivly and the municipalities.

If we stand upon a distinction in the power of the [*237] commissions as proposed, it may lead to the conclusion that so far as street railroads are concerned the legislature has no power to interfere in case of contracts such as that in Rochester and others of like effect because as suggested in the opinion in the *Quinby* case and as claimed by the appellants in that case, such contracts have passed beyond legislative recall.

The order should be affirmed, with costs.

HISCOCK, Ch. J., CUDDEBACK and MCLAUGHLIN, JJ. (the latter in opinion in which also HISCOCK, Ch. J., concurs) concur with CRANE, J.; CHASE, J., reads dissenting opinion, in which COLLIN, J., concurs; HOGAN, J., dissents generally.

Order reversed, etc.

The Nixon Case.

[Reported in 229 N. Y. 356.]

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK, Respondent, *v.* LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District et al., Appellants.

(Argued May 3, 1920, decided July 7, 1920.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 23, 1920, which affirmed an order of Special Term granting a motion for a writ of prohibition.

The facts, so far as material, are stated in the opinion.

Terence Farley, *Henry M. Chamberlain* and *Russell B. Burnside* for public service commission, appellant.

[*357] *Watson B. Robinson* and *Charles A. Frueauff* for William R. Begg et al., as receivers of Manhattan and Queens Traction Corporation, appellants.

John P. O'Brien, *Corporation Counsel* (*Edgar J. Kohler* of counsel), for respondent.

CARDOZO, J. On October 29, 1912, the South Shore Traction Company obtained the consent of the city of New York to the construction and operation of a street railway along stated streets and avenues, chiefly in the borough of Queens. The consent was given upon the condition that five cents should be the maxmium fare. In August, 1919, the receivers of the Manhattan and

Queens Traction Corporation, which had succeeded to the franchise of the South Shore Traction Company, made [*358] application to the public service commission for authority to charge a higher fare on the ground that the existing maximum was unjust and inadequate. A writ of prohibition directed to the commission was issued by the Supreme Court, and the order granting the writ affirmed by the Appellate Division.

At the date of this franchise, the public service commission was empowered by statute to increase "the maximum rates, fares, or charges chargeable by any * * * street railroad corporation" when found to be inadequate to yield a fair return (section 49, Public Service Commissions Law; Consol. Laws, chap. 48). That power came to the commission through the amendment of the Public Service Commissions Law in June, 1911 (L. 1911, chap. 546; *People ex rel. Ulster & Del. R. R. Co.* v. *Public Service Commission*, 171 App. Div. 607; 218 N. Y. 643), if it did not already exist under the law as first enacted in 1907 (L. 1907, chap. 429, sec. 49. Cf. the statutes construed in *People ex rel. Vil. of South Glens Falls* v. *Pub. Service Comm.*, 225 N. Y. 216, 223; *People ex rel. N. Y. Steam Co.* v. *Straus*, 186 App. Div. 787, 793; 226 N. Y. 704, and *Arlington Board of Survey* v. *Bay State Street Ry. Co.*, 224 Mass. 463). Contracts fixing rates, if made before the enactment of these statutes, were subject at the utmost to the possibility of the exercise by the state of its police power in the future. Contracts made thereafter were subject to a possibility which had become merged in a reality. It was no longer a question of what the state might do at some indefinite and unknowable time. It was a question of what the state had

already done, drawing upon sources of energy, reserves of power, till then latent and potential, and manifesting its will in law. A new public policy had been initiated. A new right had been declared. Rates were thereafter to be just and reasonable alike for carriers on the one side and for passengers or shippers on the other. Neither class would be permitted for its own benefit to set the [*359] rule at nought. The state through its delegate, the commission, would lower the charges if too high. It would raise them if too low (*People ex rel. N. Y. Steam Co.* v. *Straus, supra; Arlington Board of Survey* v. *Bay State Street Ry. Co., supra; Postal Tel.-Cable Co.* v. *Associated Press*, 228 N. Y. 370, 375; *Armour Packing Co.* v. *U. S.*, 209 U. S. 56; *Union Dry Goods Co.* v. *Georgia Pub. Service Corp.*, 248 U. S. 372). Rate-making was to be no longer an affair of predominantly private interest, in which the state would interfere without system and with spasmodic and intermittent action. A superintending agency of government had taken the matter in hand.

The question soon arose whether the new rule was retroactive, and annulled existing contracts in conflict with its terms. Indisputably it annulled such contracts between carriers and passengers, or carriers and shippers (*Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *People ex rel. N. Y. Steam Co.* v. *Straus, supra; Postal Tel.-Cable Co.* v. *Associated Press, supra; Producers' Transp. Co.* v. *R. R. Comm., California*, 251 U. S. 228). "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter" (*Hudson County Water Co.* v. *McCarter*,

209 U. S. 349, 357; *Union Dry Goods Co.* v. *Georgia P. S. Corp. supra*, p. 375). We held, however, in *Matter of Quinby* (223 N. Y. 244; 227 N. Y. 601, explained and limited in *People ex rel. South Glens Falls* v. *Public Service Comm., supra*), and again in *Matter of International Ry. Co.* v. *Public Service Comm.* (226 N. Y. 474), that the legislature did not intend to clothe the commission with the power to release the obligation of then existing contracts between railroads and municipalities when the contracts established rates as conditions of a franchise. We did not hold that there was any constitutional restraint upon the grant of such a power. Restraint under the Federal Constitution, there [*360] certainly was none (*City of Worcester* v. *Worcester Con. St. Ry. Co.*, 196 U. S. 539, 548; *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 178; *Union Dry Goods Co.* v. *Georgia Pub. Service Corp., supra; Postal-Tel. Cable Co.* v. *Associated Press, supra; City of Englewood* v. *Denver & So. P. Ry. Co.*, 248 U. S. 294; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79; *People ex rel. Vil. of South Glens Falls* v. *P. S. Comm., supra*). We left open the question whether there was any under the Constitution of the state (Const., art. III, sec. 18; *Matter of Quinby, supra*, p. 463; *Matter of Int. Ry. Co., supra*, p. 482). Limiting our ruling strictly to the necessities of the case, we held that where the consent of the municipality had been granted upon conditions, an intent to permit the commission to impair the obligation of such conditions or of the contract which embodied them, was not to be imputed to the legislature as the result of doubtful inference (*Matter of Quinby, supra; Matter of Int. Ry. Co., supra*). On the other hand, we expressly conceded

as we had often before held, that there was plenary power in the legislature to determine the conditions that might be attached by municipalities to consents to be given in the future (*Matter of Quinby, supra,* at p. 261; *Matter of 34th St. R. R. Co.,* 102 N. Y. 343; *Beekman v. Third Ave. R. R. Co.,* 153 N. Y. 144, 152; *People ex rel. S. S. Traction Co. v. Willcox,* 196 N. Y. 212). It was the "annulment" of a condition already imposed, the "abrogation of a defeasance" already attached, the impairment of an obligation already created (*Matter of Int. Ry. Co., supra*), which we refused to bring within the jurisdiction of the commission through words of doubtful import.

A different problem confronts us here. Here the statute was in existence when the municipal consent was given. Recognition in such circumstances of the power of the commission involves no interference with a grant already executed. No condition is annulled; no defeasance is abrogated; no obligation of contract is nullified or impaired. [*361] The obligation of a contract is determined by the law in force when it is made (*McCracken v. Hayward,* 2 How. [U. S.] 608, 612). There are times when, in the exercise of the police power, an obligation, once attaching, may be modified or destroyed (*Louisville & Nash. R. R. Co. v. Mottley, supra; Union Dry Goods Co. v. Georgia Pub. Serv. Corp., supra; Producers' Transp. Co. v. R. R. Comm., supra*). That problem never arises when the power has been exerted before the contract has been made. Impairment is conceivable as the result of a statute passed thereafter. Impairment is inconceivable when, at the time of the contract, the statute is in force (*Lehigh Water Co. v. Easton,* 121 U. S. 388; *Denny v. Bennett,* 128 U. S. 489; *Oshkosh*

Water Works Co. v. *Oshkosh*, 187 U. S. 437, 446). Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is. The statute which clothed the commission with jurisdiction to increase charges if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred. The commission is now holding the city to terms which were accepted by implication when the conditions were imposed. This is not to "transform a consent that was qualified into one that is absolute" (*Matter of Int. Ry. Co., supra*, p. 482) as the result of retroactive legislation. This is merely to give effect to the settled rule that contracts are made in submission to existing legislation. / Nothing in the *Quinby* case commits us to another doctrine. The contract there considered preceded by a score of years the promulgation of the statute which subjected rates and charges to revision by the commission if excessive or inadequate. The opinion must be read in the light of the facts before us (*Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Colonial City Traction Co* v. *Kingston City R. R. Co.*, 154 N. Y. 493), and in that of later opinions which explain and circumscribe [*362] its scope (*People ex rel. Vil. of South Glens Falls* v. *P. S. Comm., supra*; *Matter of Int. Ry. Co.* v. *P. S. Comm., supra*). We have held, in view of the constitutional provisions requiring the consent of municipalities to the construction and operation of railroads in their streets, that the statutes ought not to be interpreted as permitting the public service commission in such circumstances to nullify existing contracts. We are now asked to hold that the

municipalities by their contracts may nullify existing statutes. We will not go so far (*State Public Utilities Comm.* v. *City of Quincy*, 290 Ill. 360; *Collingswood Sewerage Co.* v. *Collingswood*, 91 N. J. L. 20; 92 id. 509; *Atl. Coast El. R. Co.* v. *Public Utility Comm.*, 92 N. J. L. 168; *Matter of Guilford Water Co.*, [Me.] 108 Atl. Rep. 446; *Matter of Searsport Water Co.*, [Me.] 108 Atl. Rep. 452; *Milwaukee El. R. & L. Co.* v. *R. R. Comm.*, 153 Wis. 592).

In thus holding, it may be prudent, even though unnecessary, to say that we decide the case before us, and no other. The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after the passage of the statute (Consol. Laws, ch. 48) may conceivably be so related to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions. We express no opinion upon these and like questions. They are mentioned only to exclude them from the scope of our decision. In deciding this case, we put our ruling upon the single ground that the franchise contract of October, 1912, was subject to the statute, and by the statute may now be changed.

The order of the Appellate Division and that of the Special Term should be reversed with costs in all courts, and the application denied with ten dollars costs.

Hiscock, Ch. J., Chase and Elkus, JJ., concur; McLaughlin and Crane, JJ., concur in result; Hogan, J., dissents.

Orders reversed, etc.

The Garrison Cases.

[Reported in 229 N. Y. 575.]

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LINDLEY M. GARRISON, as Receiver of THE NASSAU ELECTRIC RAILROAD COMPANY, Appellant, *v.* LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, et al., Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LINDLEY M. GARRISON, as Receiver of BROOKLYN, QUEENS COUNTY AND SUBURBAN RAILROAD COMPANY, Appellant, *v.* LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, et al., Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LINDLEY M. GARRISON, as Receiver of THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Appellant, *v.* LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, et al., Respondents.

(Argued May 3, 1920; decided July 7, 1920.)

APPEAL, in each of the above-entitled proceedings, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 12, 1920, which dismissed a writ of certiorari and affirmed the proceedings of the public service commission denying an application, by relators, for permis-

sion to increase the rate of fare for transportation of passengers on a street surface railway.

John G. Milburn, Lindley M. Garrison and *Carl M. Owen* for appellant.

Terence Farley and *George H. Stover* for Public Service Commission, respondent.

John P. O'Brien, Corporation Counsel (*Edgar J. Kohler* of counsel), for city of New York, respondent.

William N. Dykman and *William D. Guthrie* for Brooklyn City Railroad Company, *amicus curiae*.

[*576] *Henry L. Stimson* for receiver of New York Railways Company, *amicus curiae*.

Alfred A. Cook for trustee of Interborough Consolidated Corporation, *amicus curiae*.

Per Curiam. The petitions of the appellants to the public service commission requested an order authorizing the appellant to charge and collect a cash rate of fare of eight cents for the transportation of passengers "between any two points of any of said lines of railroad" of the company. We construe this as an application for an increase of fare on the entire route and so the record shows that it was construed by counsel.

We think that the following classes of franchises fall outside the scope of our decisions in *Matter of Application of the City of Niagara Falls* v. *Public Service Commission of the State of New York for the Second District* and the *International Railway Company* (de-

cided herewith) (229 N. Y. 333); *Matter of Quinby* v. *Public Service Commission* (223 N. Y. 244):

1. All franchises granted directly by the legislature.

2. All franchises granted by municipal authorities prior to January 1, 1875. Such franchises are subject to proper legislative regulation.

3. All franchises granted by municipal authorities subsequent to the passage of the Public Service Commissions Law on July 1, 1907.

4. The following franchises granted between January 1, 1875, and July 1, 1907:

a. The franchise granted in and by the consent of the common council of the city of Brooklyn to the Atlantic Avenue Railroad Company, dated March 13, 1882 (now a part of the Nassau Electric Railroad Company).

b. The franchise granted in and by the consent of the common council of the city of Brooklyn to the Prospect Park and Coney Island Railroad dated December 21, 1885, consenting to the construction of a line on Park avenue and other streets in Brooklyn.

c. The franchise granted in and by the consent of the common council of the city of Brooklyn to the Nassau [*577] Electric Railroad Company, dated June 19, 1893, covering a number of lines as therein stated.

The orders, therefore, should be affirmed without prejudice to the right of the relator to make separate applications as to the franchises which come within the

jurisdiction of the public service commission as herein indicated.

CRANE, J. (dissenting). The Nassau Electric Railroad Company was incorporated March 13, 1893, under the General Railroad Law (Laws of 1890, chap. 565, as amended). It thereafter constructed, consent from the proper authorities having been obtained, street surface railroads in certain public streets in what is now the city of Greater New York. The last consent was obtained on April 3, 1916, from the board of estimate and apportionment of the city of New York. It also acquired other franchises and rights by merging other companies whose franchises had been acquired prior to 1875 and also between 1875 and 1890. Some of these franchises had no provision as to a rate of fare, while others did. These railroads are now being operated by the relator as receiver.

On the 30th of March, 1920, as such receiver, he made an application to the public service commission of the first district for leave to increase from five to eight cents the cash rate of fare charged and collected for transportation upon the lines of such railroads. The application was in writing and set forth that a fare of five cents was insufficient to yield a reasonable compensation for the services rendered, and was, in fact, unjust, unreasonable and confiscatory. The commission fixed the following day as the time when a hearing upon the application would be had. The matter came up for a hearing at the time fixed, together with similar applications by the same relator as receiver of the Brooklyn, Queens County and Suburban Railroad Company, and of the

Coney Island and Brooklyn Railroad Company. The commission ruled, without taking any evidence in support of the facts alleged in the relator's petition, that the commission had [*578] no power or jurisdiction to authorize an increase in fares upon the railroads in question. An order was thereupon made denying the application and dismissing the proceeding, "solely upon the ground that the Commission has no power or jurisdiction upon the facts alleged in said complaint and application to determine the questions presented, or to grant the prayer of said complaint and application, or to increase the rates, fares or charges charged or chargeable on said lines of railroad, and not upon the merits." The relator thereupon obtained a writ of certiorari to the Appellate Division to review the decision of the public service commission. The city of New York, by consent, obtained an order from the Special Term of the Supreme Court, permitting it to intervene and make it an additional party defendant. The Appellate Division, after hearing the appeal, dismissed the writ, affirmed the proceeding of the public service commission as matter of law, and granted leave to appeal, certifying in its opinion a question of law was involved which ought to be reviewed by this court.

The sole question presented by the appeal is whether the commission had power to entertain and pass upon the merits of the application.

The difficulty in these surface railroad fare cases is the interpretation of article 3, section 18, of the New York State Constitution which reads: "But no law shall authorize the construction or operation of a street

railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed [*579] by the court, may be taken in lieu of the consent of the property owners."

It is pressed with much force that by reason of this provision of the Constitution the consent of the city may be given upon such terms and conditions as it sees fit to impose, and that these cannot be modified or interfered with by the state legislature in the exercise of its police power. In other words, it is claimed that the police power over street surface corporations has been limited by the Constitution in so far as the city has acted in granting a franchise. In considering this matter it will not do to emphasize the importance of a condition fixing carfare rates over any other condition that the city may impose. The question is not one of degree, but one of power. It will be conceded that generally a state has power to limit the amount of charges by railroad companies for the transportation of persons and that this power of regulation is a power of government continuing in its nature and if it can be bargained away at all it can only be by words of positive grant or by some-

thing which is in law equivalent. (*Railroad Commission Cases*, 116 U. S. 307, 325.)

The power to regulate fares is one of the police powers of the state legislature. (*Buffalo East Side Railroad Co. v. Buffalo Street Railroad Co.*, 111 N. Y. 132; *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U. S. 265.)

The condition annexed to the consent or franchise fixing the rate of fare to be charged is no different, therefore, so far as this question is concerned, than a condition fixing the kind of rails or cars that are to be used, the number of cars to be operated or the speed and manner of operation. If the legislature in the exercise of its police power cannot, because of the State Constitution, regulate the fares, it cannot regulate or control any other condition which may have been imposed by the municipality.

The legislature, therefore, either has all of its police powers reserved to it or it has no power whatever in relation to the terms and conditions of a franchise granted to a street surface railroad. We cannot say that the legislature can deal with some matters which to-day seem [*580] unimportant but is unable to touch the question of fares because, for the time being, it appears to be a matter of great public interest. We are here dealing with a question of power as before stated and the effect of its use has no bearing upon the determination.

The provisions of the Constitution, as above quoted, were carried over from the law as it theretofore existed upon the statute books of the state. Like consent was required from the local authorities before a railroad could

be constructed in a city. By placing these enactments in the Constitution certainly no different meaning was given to them. The effect simply was that the right upon the part of the local authorities to consent or to refuse consent to the building of a railroad could not be taken away by the state legislature. But the meaning and purpose of this consent was no different from that which it had when embodied in the laws instead of the Constitution. Rather it must be assumed that article 3, section 18, has the same meaning which the decisions gave to it when embodied in the law. Language means the same whether used in a statute or a Constitution.

In *City of Rochester* v. *Rochester Railway Co.* (182 N. Y. 99) it was said that the General Railroad Act gave plenary power to any railroad company incorporated under it to lay out and construct its road between the termini mentioned in the articles of association, except that subdivision 5 of Section 28 provided that the statute should not be construed to authorize the construction of any railroad upon, along or across any streets in any city without the assent of the corporation of the city. It was, therefore, necessary for the construction of any street railroad within a city that the company should obtain the consent of the city to the use of the street.

Certain conditions had been annexed to the consent given by the city of Rochester to the Rochester City and Brighton Railroad Company. As to these conditions the court said: "on the other hand it is equally clear that under the power given by the General Railroad Act to the municipality to consent to the construction of such a [*581] road, the municipality could in no degree contract away or limit the taxing power or the police power pos-

sessed by the legislature. (*People ex rel. Met. St. Ry. Co.* v. *Tax Comrs.*, 174 N. Y. 417; *Sioux City St. Ry. Co.* v. *Sioux City, supra.* See also *Worcester* v. *Worcester St. Ry. Co., supra.*) * * * In the exercise of the police power the legislature could prescribe the maximum fares to be charged by the company (*Buffalo E. S. R. R. Co.* v. *B. S. R. R. Co.*, 111 N. Y. 132; *Railroad Commission Cases*, 116 U. S. 307; *Norfolk & Western R. R. Co.* v. *Pendleton*, 156 U. S. 667), and such right was reserved by section 23 of the statute subject to the qualification that the fare should not be reduced so that the net returns to the company should be less than ten per cent on the sum actually invested. So equally in the exercise of the taxing power it could relieve the company from the burden of any provisions imposed on it by the ordinance of the common council in 1862. (*Worcester* v. *Worcester St. Ry. Co., supra.*) Neither of these powers was necessarily to be exercised once for all. Unless contracted away the right to their exercise was continuous and statutes passed under them could be varied or altered from time to time" (p. 115).

Under the law as it stood prior to the adoption of article 3, section 18, the city in giving its consent could not impose such terms and conditions as to take from the legislature its regulatory or police power to fix fares. When, therefore, this enactment was carried over into the Constitution wherein and wherefor did it receive any other or additional meaning? The city, after 1875 and under this constitutional provision, could consent or withhold its consent, but having given its consent it could not impose any conditions which took any of the police powers away from the legislature. In other words, with

the exception of this limit of consent the legislature after 1875 possessed all the powers over street surface railroads which it theretofore had.

This is what the court said in *Matter of Thirty-fourth Street Railroad Co.* (102 N. Y. 343, 348). In the opinion will be found the following: "The legislature in dealing [*582] with the subject of street railways, was under certain restrictions imposed by article 3, section 18, of the Constitution. * * * The plain purpose of the Constitution in requiring the consent of the local authorities and of property owners to the construction of a street railroad, was the protection of public and private interests against hostile and injurious legislation, and to prevent the appropriation of highways to railroad uses by legislative grant, without consulting the interests of the locality. * * * But the Constitution, neither by express language nor by implication abridges the legislative power over the subject outside of the matters particularly enumerated. It needs no citation of authorities to sustain the postulate, that except as restrained by the Constitution, the legislative power is untrammeled and supreme, and that a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control. Nothing is subtracted from the sum of legislative power, except that which is expressly or by necessary implication withdrawn. The legislature is prohibited from granting a franchise to construct a street railroad, except upon certain specified conditions. But it is not prohibited from annexing further conditions not

inconsistent therewith, and whether other conditions are necessary or proper, is a matter resting in the wisdom and discretion of the legislature."

And if this were not so, what dire results would follow. If, as claimed, a city could impose any and as many conditions as it pleased and these were removed from all legislative control the police power or the power of regulation would be forever gone. The legislature could not act and certainly the city could not alter its terms and conditions at will. The police power unless delegated does not rest with municipalities. We would have here the anomalous situation of the reserve force called the police power inherent in government for its preservation and for the safety and morality of society in abeyance or [*583] suspended as to street surface railroads. One reason why the police power has never been defined with marked limitations is because none can foresee the future, and yet all realize that changes will come which must be dealt with.

Again, the word "consent," as used in the Constitution, must mean the same for the city as it does for the property owner. Can the property owner in granting his consent also annex terms and conditions, and if not, why not? If he refuses consent and it is passed on to commissioners appointed by the court whose action is thereby taken in lieu of the property owner's consent, can these commissioners also annex terms and conditions to their determination? If not, why not? The consent of the property owner or his representative certainly is as vital as that of the local authorities.

The fact is that until these present cases arose regarding increased fares no one seriously questioned the power of the legislature to limit or restrict the city in granting its consent to the construction of a railroad. Two decades ago or more the serious question with reference to railroad matters was whether the municipalities through their boards of aldermen or common councils and the like could or should give away valuable street franchises without proper compensation or return to the people. There was then enacted section 93 of chapter 565 of the Laws of 1890, which later became section 173 of the Railroad Law, Laws of 1910, chapter 481. These provisions directly touched the power and the authority of the city to consent and limited the right to a narrow sphere. In substance the consent of the local authorities was conditioned upon the franchise being sold at public auction to the bidder who would agree to give the city the largest percentage per annum of the gross receipts of the corporation and a bond or undertaking for the fulfillment of its agreement. Notice of the time and place of the sale was required to be published by the local authorities for at least three successive weeks in two daily newspapers. Other conditions were also enumerated.

As to the city of New York, section 73 of the Greater [*584] New York charter of 1897, constituting chapter 378 of the Laws of 1897, and section 73 of the present charter, as revised in 1901, provide that no right to use the streets shall be granted to any corporation for a longer period than twenty-five years and that at the end of that time the rights and property of the corporation shall revert to the city under certain limitations.

I cannot find that these provisions, solely enacted for the benefit of the public, have ever been questioned as to their constitutionality. On the contrary, it has been held by this court that the legislature had the right either under its police powers or as dealing with its creatures and agent, the municipal corporation, to place upon its consent under the Constitution, restrictions and limitations. (*People ex rel. West Side Street Railway Co.* v. *Barnard*, 110 N. Y. 548; *Beekman* v. *Third Avenue Railroad Co.*, 153 N. Y. 144; *People ex rel. South Shore Traction Co.* v. *Willcox*, 196 N. Y. 212.)

Now in these days the much agitated question confronting us is the power of the legislature to raise the street railroad carfares. If the legislature had power to limit the consent of a city to the highest bidder at public sale it surely has power to provide any other condition not inconsistent with the constitutional mandate. Thus it can say that the consent may be conditioned upon a rate of fare not to exceed five cents, but that future charges will be under the control and regulation of the legislature. This is exactly what has been done regarding all the franchises here involved.

Having the right to limit the conditions upon which the city shall give its consent or its franchise, who is to say other than the legislature what those limitations shall be? Once conceding that the police power has not been taken away by article 3, section 18, of the Constitution, and that the legislature in the interests of the public welfare may control the city in the exercise of its consent or the right to give a franchise, then that power extends to the regulating of fares as well as any other condition that the city may seek to impose.

[*585] As stated before, either the consent of the city is beyond legislative regulation or else it is subject to all the powers which the legislature may exercise over municipalities or within its police power not destructive of the right to consent or to refuse consent.

Prior to the granting of any of the franchises involved in any of these cases the legislature had provided conditions and terms regarding railroad fares which were equally as binding as the provisions regarding the sale of the franchises at public auction to the highest bidder.

Section 101 of chapter 565 of the Laws of 1890, which with an addition became section 181 of the Railroad Law, chapter 481 of the Laws of 1910, not only fixed the rate of fare at five cents, but provided as follows: "The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the Public Service Commission shall possess the same power, to be exercised as prescribed in the Public Service Commissions Law."

By section 49 of the Public Service Commissions Law the commission may determine the just and reasonable rates and fares to be charged by a railroad company.

The consents, therefore, given to all these railroads were subject to these laws and the power of the legislature through the public service commission to regulate the rate of fare. This is the view taken in other states. (*City of Chicago* v. *O'Connell*, 278 Ill. 591; *St. Louis* v. *Public Service Commission*, 207 S. W. Rep. 799; *Kansas City* v. *Public Service Commission*, 210 S. W. Rep. 381; *Salt Lake City* v. *Utah Light & T. Co.*, 173

Pac. Rep. 556; *Virginia-Western Power Co.* v. *Commonwealth ex rel. City of Clifton Forge*, 99 S. E. Rep. 723; *Chicago & Alton Railroad Co.* v. *Tranbarger*, 238 U. S. 67.)

My conclusion is that when the city granted the franchises to the railroads here in question they were subject to the laws above stated regarding the power of the legislature and the public service commission to regulate the fares and that any conditions named by the city were [*586] subject to this power. The public service commission should not have denied the application of the relator herein for want of power.

I do not think this right of the public service commission to regulate fares rests upon that clause of the franchises making the Railroad Law a part thereof. The franchises are granted upon condition that the railroad shall comply with the provisions of the Railroad Law which includes section 181 above referred to. The franchises in the *Quinby* case also contain a similar provision. They were conditioned upon compliance with article 4, chapter 39 of the General Laws of the State of New York of 1892. This law contained section 101 which later became section 181 of the Railroad Law. As above stated, section 101 reserved the right in the legislature to regulate fares. In deciding the *Quinby* case we did not consider this of sufficient importance to control our decision. If the franchises in these cases now before us had made no reference whatever to the Railroad Law, yet the police power of the legislature, in my judgment, would have been the same and the Railroad Law would impliedly be read into the franchises

and become a part thereof. I rest my conclusion upon the reserve police power in the legislature to regulate and control railroad fares, which power has not been bargained away even if it could be (*Chicago & Alton Railroad Co.* v. *Tranbarger, supra*) by any act of the state.

The city, of course, has the right to annex terms and conditions to its consent to the construction of a railroad, and these terms and conditions are binding upon the parties. (*Public Service Commission* v. *Westchester Street Railroad Co.*, 206 N. Y. 209, 216.) We are here dealing, however, with the power of the state over such terms and conditions, which is another matter altogether.

It is said that the *Quinby* case (*Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244) is contrary to what is here stated. The *Quinby* case was decided upon special facts and circumstances which make it a law unto itself. It apparently has not always been fully understood.

[*587] These special facts were stated in the case of *People ex rel. Village of South Glens Falls* v. *Public Service Commission* (225 N. Y. 216). Judge McLaughlin has again amplified them in his opinion in the case of *Matter of City of Niagara Falls* v. *International Railway Company*, decided herewith. When the legislature enacted section 173 of the Railroad Law it especially excepted the city of Rochester. In the charter of the city of Rochester, chapter 359 of the Laws of 1915, section 636, subdivision 2, it fixed the fare of the street surface railroads at five cents and further provided for a hearing before the public service commission, in but

one instance, and that where intersecting railroads could not agree upon the method of division between them of fares collected. We were, therefore, justified in holding that the legislature had dealt especially, for reasons best known to itself, with the railroads of Rochester and had excepted them from the general laws affecting other street surface railroads.

The order of the Appellate Division should be reversed, the determination of the public service commission annulled, and the proceeding remitted to the commission to determine the question upon the merits, with costs to the appellant.

HISCOCK, Ch. J., and ELKUS, J., concur with *per curiam* opinion; HOGAN, J., votes for plain affirmance; CARDOZO, J., dissents from so much of decision as holds that municipal franchises granted prior to January 1, 1875, do not come within the scope of the decision in *Matter of Quinby* (223 N. Y. 244); and CRANE, J., who dissents in opinion; CHASE and MCLAUGHLIN, JJ., dissent on opinion of CRANE, J., and on dissenting opinion of MCLAUGHLIN, J., in *In re Application of City of Niagara Falls* v. *Public Service Commission, Second District*, decided herewith. Said last judges, however, concur in so much of the decision as provides that the present decision shall be without prejudice to the right of the relator to make further application as in said decision provided if so advised.

Order affirmed, etc.

The Garrison Cases on Reargument.

[Reported in 229 N. Y. 645.]

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LINDLEY M. GARRISON, as Receiver of THE NASSAU ELECTRIC RAILROAD COMPANY, Appellant, *v.* LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, et al., Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LINDLEY M. GARRISON, as Receiver of BROOKLYN, QUEENS COUNTY AND SUBURBAN RAILROAD COMPANY, Appellant, *v.* LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, et al., Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LINDLEY M. GARRISON, as Receiver of THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Appellant, *v.* LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, et al., Respondents.

(Submitted September 27, 1920; decided October 22, 1920.)

MOTION for re-argument. (See 229 N. Y. 575.)

Per Curiam. The motion by the appellant for a re-argument of the appeal in each of the above-entitled proceedings should be denied.

First. It is urged that we should have held that the franchises granted to the Nassau Company and the

Brooklyn, Queens County and Suburban Company respectively, on April 3, 1916, were new contracts modifying and superseding all previous agreements with local authorities in respect of the rate of fare upon any and all of the railroads entering into such systems respectively, and that these new franchises having been granted subsequent to July 1, 1907, were beyond the application of our decision in *Matter of Quinby* v. *Public Service Commission* (223 N. Y. 244), and were subject to the jurisdiction of the public service commission. This proposition was fully considered on the original argument, and we reached the conclusion, which we have no disposition to change, that under all of the circumstances [*646] attending the granting of said franchises and including the saving clause in respect of fares on constituent roads therein contained, said franchises did not have the effect of superseding and so abrogating franchises and contracts regulating fares on constituent roads as to become franchises or contracts beyond the scope of the *Quinby* case within the principles of the case of *People ex rel. City of New York* v. *Nixon* (229 N. Y. 356).

Second. While the order before us for review in each of the above-entitled proceedings was considered as one denying jurisdiction by the public service commission to change the rate of fare on the system involved as an entirety, we nevertheless felt that it was desirable to indicate that certain constituent roads under their respective franchises and contracts as the latter appeared to us on the hearing would be excepted from the application of our decision in the *Quinby* case. We did not include in this classification of the franchises thus excepted,

those in which no rate of fare had been fixed, for the status of these seemed obvious.

Going still further we enumerated certain franchises which on the facts then appearing to us seemed to come within some one of the classes excepted from the operation of the *Quinby* case. The many franchises of the different roads entering into the three large systems were not very fully or satisfactorily classified for us for this purpose, and we did not intend that our enumeration of specific roads as coming within some one of the excepted classifications should be conclusive or exclusive. The primary and fundamental purpose was to indicate principles by which franchises might be differentiated, leaving the facts in respect of any particular franchise to be developed on proper application before the public service commission for the purpose of determining to which class that particular franchise might belong.

HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, McLAUGHLIN, CRANE and ELKUS, JJ., concur.

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements.

The North Hempstead Case.

[Reported in 231 N. Y. 447.]

[*447]

TOWN OF NORTH HEMPSTEAD, Respondent, *v.* PUBLIC SERVICE CORPORATION OF LONG ISLAND, Appellant.

(Argued May 31, 1921; decided July 14, 1921.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court, entered July 27, 1920, which reversed an order of Special Term denying a motion to continue a temporary injunction to restrain defendant from increasing rates charged for gas furnished to private consumers over the sum fixed therefor in the town's consent, pending a hearing before the public service commission and continued the injunction.

[*448] *Luke D. Stapleton* and *Avery F. Cushman* for appellant.

James L. Dowsey for respondent.

[*449] POUND, J. The first question certified is more broadly stated than is necessary for the determination of this appeal which presents only the case of a consent given after the enactment of the statute referred to in the question. It reads as follows:

"Has a public service gas corporation, whose consent from the municipal authorities of a town contains as a regulation a statement prescribing a maximum rate to be charged to private consumers, the right to charge an increase rate by filing a schedule as prescribed by

statute specifying the increased rate pursuant to section 66, subdivision 12, of the Public Service Commissions Law, in advance of an order of the Public Service Commission determining and prescribing that the increased rate is just and reasonable?"

The second question, "Was plaintiff's motion properly granted as a matter of law?" presents the actual controversy on this appeal, and is the only one that can be reviewed. (*Schenck* v. *Barnes*, 156 N. Y. 316.)

The provisions of Public Service Commissions Law ([Cons. Laws, ch. 48] § 66, subd. 12) in question read as follows:

"* * * Unless the Commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, an electrical corporation or municipality in compliance with an order of the Commission, except after thirty days' notice to the Commission and publication for thirty days as required by order of the Commission, which shall plainly state the changes proposed to be made in the schedules then in force and the time when the change will go into effect. The Commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality [*450] shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates

and charges applicable to such services as specified in its schedule filed and in effect at the time. * * *"

These provisions were in force when the plaintiff gave its consent to the defendant to maintain and operate its gas mains within the town; entered by implication into the terms of such consent; formed part of its obligation; and were notice to the town that the consent was coupled with the provision of the statute that the defendant was empowered to abrogate it as to the rates stipulated therein and was allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service (Public Service Commissions Law, § 65, subd. 1) on thirty days' notice to the commission and publication for thirty days as required by order of the commission. (*Village of South Glens Falls* v. *Public Service Commission*, 225 N. Y. 216; *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, 361; *Public Service Commission* v. *Iroquois Natural Gas Co.*, 184 App. Div. 285; affirmed, without opinion, 226 N. Y. 580; *People ex rel. New York Steam Co.* v. *Straus*, 186 App. Div. 787, 805; affirmed, without opinion, 226 N. Y. 704.)

After rates are established by the filing of schedules, a review thereof may be had on complaint under Public Service Commissions Law (§§ 71, 72) and the commission will then determine and fix such prices as will in its judgment be adequate, just and reasonable.

This method of increasing rates without first obtaining an adjudication as to their reasonableness may appear defective and illogical, but no constitutional limitation on legislative power interdicts it and no excep-

tion in favor of rates stipulated in a municipal consent granted subsequent to the enactment of the Public Service Commissions Law can be read into it without doing violence to the plain language of the statute. The legislative [*451] power of rate regulation must, therefore, be upheld so far as it affects franchises of which such statute forms a part. The question of the power of gas companies to increase rates without a prior determination of the Commission as to the fairness thereof when the franchise fixing such rates in connection with the consent of the municipal authorities (Trans. Corp. Law [Cons. Laws, ch. 63], § 61, subd. 1) antedates the statute is not before us. We have already held that the gas company is not remediless in such a case. (*Village of South Glens Falls* v. *Public Service Commission, supra.*)

The order appealed from should be reversed, with costs in this court and in the Appellate Division, and the order of the Special Term vacating the temporary injunction should be affirmed. The second question should be answered in the negative and the first question should not be answered.

HISCOCK, Ch. J., HOGAN, CARDOZO, CRANE and ANDREWS, JJ., concur; CHASE, J., deceased.

Ordered accordingly.

Summary of Typical Cases in Which the New York Commission Has Asserted and Exercised Regulatory Powers Over the Appellee, Under the Public Service Commission Law of the State of New York.

The Public Service Commission for the First District and its successors have uniformly asserted and exercised regulatory powers, over the rapid transit railroad operations of appellee, under the Public Service Commission Law rather than under Contract No. 3 or the Rapid Transit Act. So much appears from formal declarations of the Commission in the official annual reports of that body to the New York Legislature. For instance, in the 1915 report the Public Service Commission said (Vol. I, p. 323): "In pursuance of the powers and duties conferred by the Public Service Commissions Law the Commission for the First District continued to exercise supervision over the activities of all common carriers doing business within the First District. These included trunk railroads, railroad terminal companies, street railroads (embracing underground, elevated and surface lines), stage coach companies and baggage and terminal companies."

Hereinbelow are listed the indicative titles of a few of the many cases where the Public Service Commission for the First District, and its successors, have exercised regulatory authority over the appellee and over its operation of rapid transit railroads. In all of these cases it appears, either by formal statements of counsel to the Commission, by the language of the respective orders or

by the distinctive designation which they bear, that the regulation and the Commission action taken was *under and pursuant to the statute*, and not under any asserted contractual power or authority.

In the list below the references are to the official Annual Reports of the Public Service Commission of the First District or its successors, to the Legislature of the State of New York, unless otherwise indicated, the arrangement being chronological.

Case No. 1—Order requiring all companies under jurisdiction of Public Service Commission to report all accidents, collisions, derailments and serious interferences with traffic; appellee included. Adopted July 30, 1907 (Annual Report, 1907, Vol. I, p. 682).

Case 445—In Matter of Application of Interborough Rapid Transit Company for leave to execute a mortgage upon all of its property to secure the issue of bonds not to exceed in face value $55,000,000. Application granted April 23, 1908 (Annual Report, 1908, Vol. II, p. 120).

Case 556—In the Matter of the Hearing upon the Motion of the Commission on the question of improvements in and additions to the service of the Interborough Rapid Transit Company in respect to the extension of the Broadway Subway Express Service to Kingsbridge and of the Broadway Local Service to Dyckman Street. Complaint dismissed June 5, 1908 (Annual Report, 1908, Vol. II, p. 532).

Case 629—In the Matter of the Hearing upon the Motion of the Commission on the question of Improvement in and Additions to the Service of the Interborough

Rapid Transit Company in respect to changes in subway cars now in use and in respect to the type of car to be purchased for future use in the subway. Side doors ordered July 10, 1908 (Annual Report, 1908, Vol. I, p. 344).

Case 641—In Matter of Uniform System of Accounts for Street Railroads. Appellee included as a street railroad. Order adopted December 8, 1908 (Annual Report, 1908, Vol. I, p. 406).

NOTE: Under Contract No. 3 and the Elevated Extension Certificate, power was reserved to the Commission to establish the form of appellee's accounts thereunder. That power has never been exercised. The 1908 order, now effective, was under the statute.

Case 708—Regulations prescribing the form and governing the construction and filing of schedules of fares for passenger service of street railroad corporations. Tariff circular No. 1. Issued by Order 708 of the Commission, August 28, 1908 (R. 22-25).

Case 1074—New side-door order, May 14, 1909 (Annual Report, 1909, Vol. II, p. 253).

Case 1291—In the Matter of Rehearing upon the Application of the Interborough Rapid Transit Company as to the order entered on December 28, 1910, on the question of improvements in and additions to the regulations, practices and service of the Interborough Rapid Transit Company, in respect to service on its subway lines. Order as to cars and seats entered January 7, 1913 (4 P. S. C. Rep., First Dist., p. 1). Subsequently the Public Service Commission for the First District instituted summary proceedings, under the provisions of

Section 57 of the Public Service Commission Law, for the purpose of having alleged violations of this order stopped and prevented by mandamus. That litigation was carried through to the New York Court of Appeals and was decided adversely to the Commission (*Matter of Public Service Commission* v. *Interborough R. T. Co.*, 172 App. Div. 324; 219 N. Y. 355).

Case 1614—In the Matter of the Application of the Interborough Rapid Transit Company for authority to execute its proposed first refunding mortgage securing its gold bonds, and for the consent of the Commission to the issuance of certain bonds thereunder. Order entered March 20, 1913 (Annual Report, 1913, Vol. I, p. 310).

Case 1628—In the Matter of the Hearing on the Motion of the Commission on the question of regulations to be prescribed as to all public service corporations within the jurisdiction of the Public Service Commission for the First District, with reference to safeguarding and protecting employees from injury by high tension electrical apparatus or other dangerous conditions. Order entered for certain protective measures on April 25, 1913 (Annual Report, 1913, Vol. I, p. 210).

Case 1670—In the Matter of Filing with the Public Service Commission for the First District of tariff schedules by street railroad corporations. Order adopting regulations April 25, 1913; appellee included as a street railroad (Annual Report, 1913, Vol. I, p. 450).

Case 1670—In the Matter of the filing with the Public Service Commission for the First District of tariff schedules by street railroad corporations. Order adopted

February 18, 1918; appellee included as a street railroad (R. 22-25).

Case 1695—In the Matter of the Form of Annual Report to be filed by railroad and street railroad corporations, etc.; appellee included. Order June 17, 1913 (Annual Report, 1913, Vol. I, p. 444).

NOTE: Provisions of Contract No. 3 and the Elevated Extension Certificate reserved to the Commission power to require reports, but the report and the form required by this order is applicable to all street railroad corporations and has its authority in the statute.

Case 1790—In the Matter of the Hearing upon the question of improvement and changes in the regulations, practices, equipment, appliances and service of the Interborough Rapid Transit Company at the stations on its Third Avenue elevated line and on its Lenox Avenue subway line at 149th Street, Bronx. Proceeding discontinued on February 6, 1914 (Annual Report, 1914, Vol. I, p. 621).

Case 1812—In the Matter of the Hearing on the Motion of the Commission concerning the regulations, practices, service and rates of fare of street railroad corporations owning, operating or managing street railroads subject to the jurisdiction of the Commission in respect to the return of fares or the issuance of emergency or block tickets. Order issued against I. R. T. July 30, 1914 (Annual Report, 1914, Vol. I, p. 587).

Case 1902—In the Matter of the Hearing on Motion of the Commission on the question of improvements and additions to the regulations, practices, appliances and service of Interborough Rapid Transit Company with reference to preventive precautions in respect of fires

and short circuits in Manhattan-Bronx and Brooklyn-Manhattan Rapid Transit Company. Order for installation of precautions entered April 6, 1915 (Annual Report, 1915, Vol. I, p. 583; P. U. R. 1916B, p. 682).

Case 2005—In the Matter of the Hearing on the Motion of the Commission concerning the regulations and practices of the Interborough Rapid Transit Company, New York Consolidated Railroad Company, Nassau Electric Railroad Company and South Brooklyn Railway Company with regard to the hours of labor of their telegraph or telephone operators, telegraph or telephone levermen and train despatchers. Case discontinued December 10, 1915 (Annual Report, 1915, Vol. I, p. 613).

Case 2182—In the Matter of the Application of the Interborough Rapid Transit Company for authority to issue $16,436,000 face amount of five per cent. bonds under and secured by its first and refunding mortgage dated March 20, 1913. Order for issue adopted May 25, 1917 (Annual Report, 1917, Appendices to Vol. I, A to E, p. 20; P. U. R. 1917E, p. 1070; P. U. R. 1918F, p. 1023).

Cases 2182, 2218, 2306—(a) In the Matter of the Application of the Interborough Rapid Transit Company for authority to issue $16,436,000 face amount of five per cent. bonds under and secured by a first and refunding mortgage dated March 20, 1913; and (b) In the Matter of the Application of Interborough Rapid Transit Company for authority to issue $25,483,772 face amount of five per cent. bonds under and secured by its first and refunding mortgage dated March 20,

1913; and (c) In the Matter of the Application of Interborough Rapid Transit Company for authority to issue and dispose of $39,416,000 face amount of three-year seven per cent. notes. Orders adopted September 5, 1918 (Annual Report, 1917, Appendices to Vol. I, A to E, p. 26; Annual Report, 1918, Vol. I, p. 511; P. U. R. 1918E, p. 994).

Case 2136—Arthur Woods, Police Commissioner, Complainant, against the Interborough Rapid Transit Company, Defendant, "Protective railings at stations." Company placed the railings in position at certain designated stations and complaint dismissed March 27, 1918 (Annual Report, 1918, Vol. I, p. 643).

Case No. 2260—In the Matter of the hearing on motion of the Commission on the questions of repairs, improvements, changes or additions by Interborough Rapid Transit Company in and to the 155th Street Station of the Sixth and Ninth Avenue Elevated Lines; and of the construction, completion and placing in operation of that portion of the Eighth Avenue and 162nd Street Connection extending from said 155th Street Station to and including the Sedgwick Avenue Station. Decision, December 10, 1917 (P. U. R. 1918E, p. 1006).

Case 2311—In the Matter of the Hearing on the Motion of the Commission on the question of improvement in and addition to the service, equipment, tracks, structures, regulations and practices of the Interborough Rapid Transit Company in respect to the transportation of passengers on its subway and elevated lines. First order for service in this case, Order "A," issued September 7, 1918; Order "A" modified November 30,

1918; various modifications were later issued (Annual Report, 1918, Vol. I, p. 686; P. U. R. 1918F, p. 1030).

Case 2081—Appellee ordered June 9, 1925, to make connection by subway and ramps between subway and elevated stations at 149th Street and 3rd Avenue (Annual Report, 1925).

NOTE: Agreement made to carry this order into effect September 11, 1925, recites that the Commission ordered this improvement "in the exercise of the powers vested in it by virtue of the Public Service Commission Law."

Case 2627—In the Matter of the hearing on the motion of the Commission upon the regulations, practices, equipment, appliances and service of the Interborough Rapid Transit Company (P. U. R. 1922D, p. 152, May 2, 1922; P. U. R. 1924A, p. 774, August 22, 1923).

Case 2849—In the Matter of the Hearing on Motion of the Commission upon the conditions existing in the stations, toilet rooms, tunnels and other parts of the railroads and rapid transit railroads operated by the Interborough Rapid Transit Company as regards cleanliness and sanitation, and upon the regulations, practices and facilities employed with reference thereto by the Interborough Rapid Transit Company. Orders issued on March 10, 1927, May 12, 1927, and May 25, 1927. In this case, counsel to the Commission stated that the Commission was proceeding under subdivision 2 of Section 49 of the Public Service Commission Law (Proceedings of the Transit Commission, March 10, May 12, May 25, 1927).

Case 2851—In the Matter of the Hearing on Motion of the Commission upon the regulations, practices, equipment, appliances and service of Interborough

Rapid Transit Company on the Lexington-Fourth and Broadway-Seventh Avenue lines operated by the said company. The original stated purpose of the hearing was to consider the necessity of placing more platform men in order to speed up service, but the purpose was diverted to one involving general service, in which an effort was made to lay an apparent basis for a preconceived recommendation of adding to the subway equipment 432 additional cars. Incidentally, there were references during the hearing to the lengthening of platforms and to a plan of reservoir stations. While no formal order has been served by the Commission upon the Company, definite announcement was made by the Commission or its special counsel of a determination to require and to force the Company to make a large addition to the number of its cars.

On February 14, 1928, the Transit Commission instituted an action in the New York Supreme Court, entitled "Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant," wherein and whereby it sought, through the means of a summary proceeding instituted under Section 57 of the Public Service Commission Law, to compel appellee to charge a five-cent fare on its rapid transit railroad lines and to enjoin it from charging a seven-cent fare (Addition R. 3738).

Tables Showing Rate Bases, According to Various Contentions of the Parties Hereto, and Return Thereon.

1. The Present Value of All the Property Devoted to the Public Service.

A. Computation Based on Company's Figures for Company-provided Property and on Figures of Commission's Engineers for City-provided Property.

	1926	1927
Properties:		
Company Property Contracts 1 and 2	$106,793,000	$106,788,000
Company Property Contract 3	230,804,000	232,010,000
Company Property Elevated Certificates	65,032,000	65,338,000
Manhattan Railway Original Property	143,556,000	143,556,000
City Property Contracts 1 and 2	142,687,000	142,687,000
City Property Contract 3	197,193,000	199,693,000
Materials and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Gross Present Value Company and City Property at least	$897,304,597	$901,373,648
*Amount necessary to Recondition	2,580,000	2,580,000
Present Value Company and City Property at least	$894,724,597	$898,793,648
Earnings available as a return	$ 23,698,721	$ 22,622,761
Per cent. of return actually earned on such value	2.65%	2.52%
Earnings required for 8% return at least	$ 71,577,968	$ 71,903,492
Deficiency in earnings below an 8% return at least	$ 47,879,247	$ 49,280,731

* This amount is the estimate of the Commission's engineers (R. vol. II, pp. 843, 1082).

This computation is identical with that in the record (R. vol. II, p. 850) except for a typographical error in the amount of the second item "Company Property Contract 3" for 1927. The amount printed in the record at that page is $230,010,000. The correct amount is $232,010,000 (R. vol. II, p. 848).

Rate Bases and Return—Tables 1-A, 1-B.

SUMMARIZED RESULTS OF IDENTICAL CALCULATIONS ON SIMILAR BASES FOR PRIOR YEARS ARE AS FOLLOWS:

	Present Value Company and City Property at least	Earnings Available as a Return	Per Cent. of Return Actually Earned on Such Value	Earnings Required for 8% Return at least	Deficiency in Earnings below 8% Return at least
1921	$824,583,731	$15,828,434	1.92%	$65,966,700	$50,138,266
1922	754,869,528	17,974,948	2.38%	60,389,562	42,414,614
1923	661,487,351	17,645,908	2.03%	68,918,988	51,273,080
1924	868,980,517	19,436,182	2.24%	69,518,441	50,082,259
1925	868,117,005	20,404,446	2.35%	69,449,360	49,044,914

(R. vol. II, p. 939.)

B. Computation Based on Transit Commission's Engineers' Reproduction Cost Figures.

	1926	1927
Properties:		
Company Property Contracts 1 and 2	$102,997,000	$102,997,000
Company Property Contract 3	190,328,000	191,484,000
Company Property Elevated Certificates	64,959,000	65,233,000
Manhattan Railway Original Property	114,565,000	114,565,000
City Property Contracts 1 and 2	142,687,000	142,687,000
City Property Contract 3	197,193,000	199,693,000
Materials and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
Overhead Omitted	6,173,000	6,173,000
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Gross Present Value of Company and City Property	$830,141,597	$834,133,648
Amount necessary to Recondition	2,580,000	2,580,000
Minimum Present Value of Company and City Property	$827,561,597	$831,553,648
Earnings available as a return	$ 23,698,721	$ 22,622,761
Per cent. of return actually earned on such value	2.86%	2.72%
Earnings required for 8% return at least	$ 66,204,928	$ 66,524,292
Deficiency in earnings below 8% return at least	$ 42,506,207	$ 43,901,531

This calculation is identical with that appearing in the record (R. vol. II, pp. 808, 851). The same basic figures for 1926 also appear in Table 2 annexed to the affidavit of Mr. N. C. Hill, Chief of the Division of Valuations and Maintenance of the Transit Commission (R. vol. II, p. 1179), entitled "On basis of cost to reproduce new (before any allowance for depreciation)."

Rate Bases and Return—Tables 1-B, 1-C.

These same basic figures also appear, under a different arrangement, in Table 5 annexed to Mr. Hill's affidavit, entitled "On basis of cost to reproduce new" (R. vol. II, p. 1182). The difference between Mr. Hill's total of $815,197,000 and the corresponding total of $830,141,597 for 1926 in the above table lies wholly in the omission by Mr. Hill of the items "Material and Supplies," "Overhead Omitted," "Excess Cost of Belmont Tunnel" and a difference in the amount of the item "Working Capital." The gross present value in the above table has been reduced by the amount of $2,580,000, which is the estimate of the Transit Commission's engineers of the amount necessary to recondition the property (R vol. II, p. 843).

SUMMARIZED RESULTS OF IDENTICAL CALCULATIONS ON SIMILAR BASES FOR PRIOR YEARS ARE AS FOLLOWS:

	Minimum Present Value of Company and City Property	Earnings Available as a Return	Per Cent. of Return Actually Earned on Such Value	Earnings Required for 8% Return at least	Deficiency in Earnings below 8% Return at least
1921	$755,583,608	$15,828,434	2.09%	$60,446,689	$44,618,255
1922	713,456,822	17,974,948	2.52%	57,076,546	39,101,598
1923	774,737,252	17,645,908	2.28%	61,978,980	44,333,072
1924	779,858,517	19,436,182	2.49%	62,388,681	42,952,499
1925	789,853,005	20,404,446	2.58%	63,188,240	42,783,794

(R. vol. II, p. 940.)

C. Computation Based on Transit Commission's Engineers' Reproduction Cost Figures with Straight Line Depreciation.

Company-provided Property Contracts 1 and 2	$ 79,340,000
Company-provided Property Contract 3	182,721,000
Company Property under Elevated Certificates	59,313,000
Working Capital	2,468,000
Original Elevated Property	70,802,000
City-provided Property Contracts 1 and 2	142,405,000
City-provided Property Contract 3	196,967,000
	$734,016,000
Earnings, year ended June 30, 1926, available as a return	$ 23,698,721
Per cent. of return actually earned on such value	3.23%
Earnings, year ended June 30, 1927, available as a return	$ 22,622,761
Per cent. of return actually earned on such value	3.08%

Rate Bases and Return—Tables 1-C, 1-D.

The figures in this table are identical with those appearing in Table 3 annexed to the affidavit of Mr. N. C. Hill, entitled "On basis of cost to reproduce new, less depreciation," as of June 30, 1926 (R. vol. II, p. 1108). This table represents a depreciation on a straight line basis of the items given in the preceding Table 1-B. The same figures also appear, under a different arrangement, in Table 6 annexed to Mr. Hill's affidavit, entitled "On basis of cost to reproduce new—less depreciation" (R. vol. II, p. 1183).

D. Computation Based on the City's Specific Deductions (brief, pp. 162-168).

	Company's Figures 1927	City Deductions	After the City's Deductions
Properties			
Company Property Contracts 1 and 2	$106,788,000	$ 69,788,000	$ 37,000,000
Company Property Contract 3	232,010,000	A 92,998,289	B 139,011,711
Company Property Elevated Certificates	65,338,000	14,603,969	B 50,734,031
Manhattan Railway Original Property	143,556,000	93,556,000	50,000,000
City Property Contracts 1 and 2	142,687,000	Note C	142,687,000
City Property Contract 3	199,693,000	Note C	199,693,000
Materials and Supplies	2,318,517	0	2,318,517
Cash Working Capital	3,087,957	0	3,087,957
Excess Cost of Belmont Tunnel	3,893,174	3,893,174	0
Gross Present Value Company and City Property at least	$901,372,648	$276,941,432	$624,532,216
Amount necessary to Recondition	2,560,000		2,560,000
Present Value Company and City Property at least	$898,792,648		$621,952,216
Earnings available as a return, year ended June 30, 1927			$ 22,622,761
Per cent. of return actually earned on such value			3.6%

Note A. We are deducting under this item $92,998,289 instead of $60,998,289, as stated in the City's brief. The City's figure resulted from the use of $230,010,000 as Company property, Contract 3, instead of the correct figure of $232,010,000. See explanation under Table 1-A.

Note B. This deduction is made on an assumed adoption of the City's suggestion that the Company is entitled only to the present value of its interest in this property,—i.e. the recapture value, rather than the present value of the property. The City brief does not assert any figure for the present value of the property.

Rate Bases and Return—Table 1-D.

Note C: The City's brief does not assert any figure for the present value of this property, but rather argues (Brief, p. 162) that it should be wholly excluded from the rate base. This therefore raises only the question of law for which the City contends. The deduction should not be made for the purposes of this table, which is based upon the inclusion of all the property used in the public service.

The return in 1926, on this base, may be shown as follows: If similar deductions, aggregating $274,399,024, are made from the 1926 figures of $894,724,597, the resultant rate base is $620,325,573. Attributing to this the 1926 earnings available as a return, $23,698,721, the percentage of return actually earned on such value is 3.8%.

Rate Bases and Returns—Table 2-A.

2. The Cost of All the Property.

A. Computation Based on Companies' Investment and Transit Commission's Engineers' Original Cost Figures for City Property.

Properties	1926	1927
Interborough Rapid Transit Company Property		
Contracts 1 and 3:		
Subway Equipment	$ 36,353,631	$ 36,348,705
Replacement of Existing Equipment	224,489	224,494
Cost of Leases	22,278,589	22,278,589
Contractor's Expense	1,302,817	1,302,817
Real Estate Owned	299,138	299,138
Office Furniture and Fixtures	42,295	42,295
Total	$ 60,500,959	$ 60,496,038
Contract 3:		
Construction	$ 57,869,303	$ 57,896,828
Additions to Construction	167,654	169,138
Equipment	48,804,961	49,145,698
Additions to Equipment	12,547,460	12,910,821
Replacement of the Railroad	41	41
Replacement of Equipment of the Railroad	322,326	325,147
Replacement of Additional Equipment	12,076	12,076
Total	$119,723,821	$120,879,749
Elevated Certificates:		
Manhattan Third Tracking:		
Plant and Structure	$ 21,577,405	$ 21,640,220
Equipment	238,167	238,167
Elevated Extensions:		
Plant and Structure	8,794,485	8,813,655
Equipment	6,765,391	6,759,101
Manhattan Division Power Plant Improvements	5,739,413	5,749,279
Replacement of Manhattan Division Power Plant Improvements	9,450	9,450
Additions to Company Lines	2,999,086	3,906,377
Total	$ 43,842,397	$ 44,116,549
Total—I. R. T. Co. Property	$224,067,177	$225,492,336

Rate Bases and Return—Table 2-A.

Manhattan Railway Company Property

	1926	1927
Real Estate and Structures:		
Land including sites of main power station and seven sub-stations	$ 2,675,330	$ 2,675,330
Buildings and Structures outside of Streets, Highways and Public Places	2,752,815	2,752,815
Main Power Station Building and Bulkhead	1,381,865	1,381,865
Sub-Power Station Buildings	493,554	493,554
Engines, Generators, Boilers, etc., in Power Stations	4,945,790	4,945,790
Cars	11,973,827	11,973,827
Subways—Cable Ducts	1,039,133	1,039,133
Land Damages including expense of litigation	22,230,687	22,230,687
Foundation, Structures, Track Superstructures, etc., of Second, Third, Sixth and Ninth Avenue Elevated Lines	35,028,159	35,028,159
Discount of New York Elevated Railroad Co., Metropolitan Elevated Railway and Manhattan Railway Co. Bonds	6,974,285	6,974,285
Amount of Par Value of Metropolitan Elevated Railway Co. Capital Stock and Bonds issued for road built by contract over expenditures for construction as found by Board of R. R. Commissioners in 1883	5,113,309	5,113,309
Intangible Street Railway Capital	14,014,000	14,014,000
Fixed Capital Subsequent to December 31, 1908	4,320,900	4,320,900
Total—Manhattan Railway Co. Property	$112,943,654	$112,943,654
Miscellaneous Interborough Items		
Materials and Supplies	$ 2,467,577	$ 2,318,517
Cash Working Capital	2,876,846	3,087,957
Total	$ 5,344,423	$ 5,406,474
Total—Company Property	$342,353,254	$343,842,464
City Property		
Contracts 1 and 2	$ 66,561,000	$ 66,561,000
Contract 3	110,505,955	113,005,955
Total—City Property	$177,066,955	$179,566,955
Total Investment	$519,422,209	$523,409,419
Earnings available as a return	$ 23,698,721	$ 22,622,761
Per cent. of return actually earned on such investment	4.56%	4.32%
Earnings required for 8% return on such investment, at least	$ 41,553,776	$ 41,872,754
Deficiency in earnings below 8% return, at least	$ 17,855,055	$ 19,249,993

Rate Bases and Return—Tables 2-A, 2-B.

This table is identical with the table in the record (R. vol. II, pp. 852, 853).

SUMMARIZED RESULTS OF IDENTICAL CALCULATIONS ON SIMILAR BASES FOR PRIOR YEARS ARE AS FOLLOWS:

	Investment	Earnings available as a return	Per cent of return actually earned on such investment	Earnings required for 8% return on such investment at least	Deficiency in earnings below 8% return at least
1921	$473,295,413	$15,828,434	3.34	$37,863,633	$22,035,199
1922	479,445,039	17,974,948	3.76	38,275,683	20,300,655
1923	485,113,378	17,645,908	3.64	38,809,070	21,163,162
1924	499,490,479	19,436,182	3.89	39,958,438	20,522,256
1925	510,681,474	20,404,446	4.00	40,854,518	20,450,072

(R. vol. II, p. 941.)

B. Computation Based on Transit Commission's Engineers' Original Cost Figures.

	1926	1927
Company Property Contracts 1 and 2	$ 47,095,000	$ 47,088,080
Company Property Contract 3	119,817,228	120,973,155
Company Property Elevated Certificates	43,628,968	43,903,121
Original Manhattan Railway Property	71,419,000	71,419,000
City Property Contracts 1 and 2	66,561,000	66,561,000
City Property Contract 3	110,305,955	113,005,955
Materials and Supplies	2,467,377	2,319,517
Cash Working Capital	2,876,846	3,087,957
Excess Cost of Belmont Tunnel	5,893,174	5,893,174
Overhead Omitted	6,173,000	6,173,000
Original Cost of Company and City Property	$476,437,748	$490,424,959
Earnings available as a return	$ 23,098,721	$ 22,622,701
Per cent. of return actually earned on such cost	4.97%	4.71%
Earnings required for 8% return on such cost, at least	$ 38,115,020	$ 38,433,997
Deficiency in earnings below 8% return, at least	$ 14,416,299	$ 15,811,296

This table is identical with the table appearing in the record (R. vol. II, pp. 809, 853-854). The basic figures are also identical with the figures in Table 4 annexed to the affidavit of Mr. Hill, entitled "Original Cost Basis" (R. vol. II, p. 1181). The difference between the aggregate original cost there shown as $461,679,000 and the corresponding total of $476,437,748, shown for 1926 in the above table, results from Mr. Hill's omission of

the items "Materials and Supplies," "Excess Cost of Belmont Tunnel" and "Overhead Omitted," and differences in the items "Company Property Elevated Certificates" and "Cash Working Capital." It will be noted that in Mr. Hill's Table 4 no figure at all is inserted under "Contract No. 3—Equipment: Provided by I. R. T." To balance his column the figure $61,780,000 should be inserted. When that figure of $61,780,000 for equipment and the figure given in his tables of $58,037,000 are added they aggregate $119,817,000 for the entire Company Property, Contract 3, which is substantially the sum given in the above table.

C. Computation Based on the City's Specific Deductions (brief, pp. 162-168) from the Commission's Engineers' Figures.

	Commission's Engineers' Estimate 1927	City's Deductions	After Making Specific Deductions
Company Property Contracts 1 and 2	$ 47,088,080	$10,088,080	$ 37,000,000
Company Property Contract 3	120,973,155	0	120,973,155
Company Property Elevated Certificates	43,903,121	0	43,903,121
Original Manhattan Railway Property	71,419,000	21,419,000	50,000,000
City Property Contracts 1 and 2	66,561,000	0	66,561,000
City Property Contract 3	113,005,955	0	113,005,955
Materials and Working Supplies	2,318,517	0	2,318,517
Cash Working Capital	3,087,957	0	3,087,957
Excess Cost of Belmont Tunnel	5,895,174	5,895,174	0
Overhead Omitted	6,173,000	0	6,173,000
Original Cost of Company and City Property	$480,424,959	$37,402,254	$443,022,705
Earnings available as a return	$ 22,622,761		$ 22,622,761
Per cent. of return actually earned on such cost	4.71%		5.1%

The return in 1926, on this base, may be shown as follows: If these specific deductions, aggregating $37,402,254, are deducted from the 1926 figure of $476,437,748, the rate base is $439,035,494. Attributing to this the 1926 earnings available as a return, $23,698,721, the percentage of return is 5.4%.

3. The Present Value of the Company-provided Property.

A. Computation Based on Company's Figures.

	1926	1927
Company-owned Property		
Company Property Contracts 1 and 2	$ 71,383,000	$ 71,378,000
Company Property Elevated Certificates	65,032,000	65,338,000
Manhattan Railway Original Property	143,556,000	143,556,000
Material and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
Total Company-owned Property	$285,315,423	$285,678,474
Company-provided Property		
Company Property provided under Construction Contract 2	$ 35,410,000	$ 35,410,000
Company Property provided under Contract 3	230,804,000	232,010,000
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Total Company-provided Property	$272,109,174	$273,315,174
Total Property Owned and Provided by Company	$557,424,597	$558,993,648
Amount necessary to Recondition	2,580,000	2,580,000
Present Value of Company Property at least	$554,844,597	$556,413,648
Amount of Earnings available as a return on all property	$ 23,099,721	$ 22,022,761
Deduct		
Rental on Contracts 1 and 2	$ 2,655,196	$ 2,655,569
*Rental Contract 3	2,903,508	2,579,429
	$ 5,558,694	$ 5,234,999
Revenue attributable to Company-provided property	$ 18,140,027	$ 17,387,763
Per cent. of return actually earned on such value	3.3%	3.1%

* This amount is arrived at as follows: For 1927: From the total subway revenue available as a return of $19,453,973, there is deducted (1) the rental paid to the City under Contracts 1 and 2 of $2,655,569, and (2) the preferential payments of the Company, which consist of the sum of $6,335,000 and the net allowances by way of interest and amortization upon the Company's investments amounting to $7,893,975, such deductions thus aggregating $16,874,544. The resulting figure, $2,579,429, agrees with the figure stated by the affiant for the City, Mr. Coleman (R. vol. II, p. 1168). For 1926: From the total subway revenue available as a return of $19,760,324, there is deducted (1) the rental paid to the City under Contracts 1 and 2 of $2,655,196, and (2) preferential payments of the Company, which consist of the sum of $6,335,000 and the net allowances by way of interest and amortization upon the Company's investments amounting to $7,809,840, such deductions thus aggregating $16,850,016. The resulting

figure, $2,903,508, agrees with the figure stated by the affiant for the City, Mr. Coleman (R. vol. II, p. 1168).

This rental was not paid in 1926 or in 1927 because there were accumulated deficits in the Company's preferentials. The City contends that those deficits have now been met and hence in each future year the net revenue from the subway in excess of the rental under Contracts Nos. 1 and 2 and the Company's said preferentials must be paid to the City as rental under Contract No. 3. As shown in our brief, these sums therefore represent for the years 1926 and 1927 the minimum revenue which is attributable to the City-provided property under Contract 3.

The rate base used in this table is identical with the table appearing in the record (R. vol. II, pp. 1078-1079), except for the typographical error of $2,000,000 referred to in the footnote to Table 1-A.

B. Computation Contrasting the Figures of the Engineers of the Transit Commission with the Company's Figures.

Description of Property	Company Present Value Figures 1926	Transit Commission Engineers' Present Value Figures 1926	Company Present Value Figures 1927
Contracts 1 and 2—Construction and Equipment	$106,793,000	$102,997,000	$106,788,000
Contract 3—Construction and Equipment	230,804,000	190,328,000	232,010,000
Extension and Third Tracking Certificates	65,032,000	64,959,000	65,338,000
Original Manhattan Property	143,556,000	114,565,000	143,556,000
Materials and Supplies	2,467,577	2,468,000	2,318,517
Cash Working Capital	2,876,846	0	3,087,957
Excess Cost of Belmont Tunnel	5,895,174	0	5,895,174
	$557,424,597	$475,317,000	$558,993,648
Commission Engineers' Estimate of Cost to Recondition	2,580,000	2,580,000	2,580,000
Total of Company-provided Property	$554,844,597	$472,737,000	$556,413,648
Amount of Earnings available as a return on all property	$ 23,698,721	$ 23,698,721	$ 22,622,761
Deduct:			
Rental on Contracts 1 and 2	$ 2,655,186	$ 2,655,186	$ 2,655,569
Rental Contract 3	2,903,508	2,903,508	2,579,429
	$ 5,558,694	$ 5,558,694	$ 5,234,998
Revenue attributable to Company provided Property	$ 18,140,027	$ 18,140,027	$ 17,387,763
Per cent of return actually earned on such value	3.3%	3.8%	3.1%

Rate Bases and Return—Table 3-B.

The figures in the middle column are identical with those set forth in Table 2 annexed to the affidavit of Mr. Hill (R. vol. II, p. 1179). They are also the same as the figures appearing in Table 1-B herein, except that the value of the City property has, of course, been deducted, and the items "Cash Working Capital," "Overhead Omitted" and "Excess Cost of Belmont Tunnel" omitted. The figures in the first and third columns are the same as those in the preceding table and are based upon the figures in the record (R. vol. II, pp. 1078, 1079). They are also the same as the figures appearing in Table 1-A, except that the items "City Property Contracts 1 and 2" and "City Property Contract 3" have been deducted. The typographical error referred to in the explanation under Table 1-A in the 1927 figure for Company Property, Contract 3, appears in this table in the record above referred to and has been corrected.

Rate Bases and Return—Table 4-A.

4. The Present Value of the Company-owned Property.

A. Computation Based on the Company's Figures.

	1926	1927
Company Property Contracts 1 and 2	$ 71,383,000	$ 71,378,000
Company Property Elevated Certificates	65,032,000	65,338,000
Manhattan Railway Original Property	143,556,000	143,556,000
Material and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
	$285,315,423	$285,678,474
*Amount necessary to Recondition	2,205,000	2,205,000
Present Value of Company-owned Property at least	$283,110,423	$283,473,474
Earnings available as a return on all property	$ 23,698,721	$ 22,622,761
Deduct		
Rental Contracts 1 and 2	$ 2,655,186	$ 2,655,569
Rental Contract 3, as explained in Table 3-A	2,903,508	2,579,429
Interest and Sinking Fund charges on bonds issued under Contracts 1, 2 and 3 to provide property, title to which is in the City and which is excluded from this base	8,631,253	8,522,943
	$ 14,189,947	$ 13,757,941
Revenue attributable to Company-owned property	$ 9,508,774	$ 8,864,820
Per cent. of return actually earned on such value	3.3%	3.1%

The rate base used in this table is identical with the table appearing in the record (R. vol. II, pp. 1080, 1081).

*This amount is the estimate of the Commission's engineers to recondition the Company-owned property (R. vol. II, pp. 842, 1082).

Rate Bases and Return—Table 4-B.

B. Computation Based Upon the Figures Given in the Commission's Brief (page 197) and the City's Brief (page 186) Contrasted with the Company's Figures in the Preceding Table—4-A.

Property Items	1927 Company's Figures	Commission's Brief Figures	City's Brief Figures
1. Equipment furnished under Contracts 1 and 2	$ 71,378,000	$ 71,378,000	$ 37,000,000
2. Extensions to Elevated under Elevated Certificates	65,338,000	50,387,250	50,734,031
3. Original Elevated Property	143,556,000	70,802,000	50,000,000
4. Materials and Supplies	2,318,517	2,318,517	2,318,517
5. Cash Working Capital	3,087,957	3,087,957	3,087,957
	$285,678,474		
Amount necessary to Recondition	2,205,000		
	$283,473,474	$197,973,724	$143,140,505
Revenue attributable to such property, year ended June 30, 1927	$ 8,864,820	$ 8,864,820	$ 8,864,820
Per cent. of return actually earned on such value	3.1%	4.5%	6.2%
Revenue attributable to such property, year ended June 30, 1926	Note	9,508,774	9,508,774
Per cent. of return actually earned on such value	Note	4.8%	6.7%

Note: The return on the 1926 Company's figure is shown in the preceding table and is 3.3%.

Rate Bases and Return—Table 5-A.

5. The Company's Original Investment.

A. Computation Based on Companies' Investment on the Company's Figures.

	1926	1927
Properties:		
Contracts 1 and 2	$ 60,500,959	$ 60,496,038
Contract 3	119,723,821	120,879,749
Elevated Certificates	43,842,397	44,116,549
Original Manhattan Railway Property	112,943,654	112,943,654
Materials and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
	$342,355,254	$343,842,464
Earnings attributable to entire system	$ 23,698,721	$ 22,622,761
Deduct		
Rental under Contracts 1 and 2	$ 2,655,186	$ 2,655,569
Rental under Contract 3	2,903,508	2,579,429
	$ 5,558,694	$ 5,234,998
Revenue attributable to Company's investment	$ 18,140,027	$ 17,387,763
Per cent of return actually earned on such value	5.3%	5%

The detailed figures which aggregate these totals of the Company's investments are shown in Table 2-A hereof and in the record (R. vol. II, pp. 852, 853). We have here used only the sub-totals.

Rate Bases and Return—Table 5-B.

B. Computation Based Upon the Transit Commission's Figures (see Commission's Brief, page 191).

Company Property Contracts 1 and 2	$ 47,093,000
Company's investment Contract 3	119,817,000
Original Manhattan Railway Property	71,419,000
Elevated Extension Certificates	43,815,000
Working Capital	2,468,000
See Note *	2,938,474
	$287,550,474
Revenue attributable to the property provided by the Companies' investment for year ended June 30, 1927, as above	$ 17,387,763
Per cent. of return actually earned on such value	6%
Revenue attributable to the property provided by the Companies' investment for year ended June 30, 1926, as above	$ 18,140,027
Per cent. of return actually earned on such value	6.3%

Note *: The first five items of this table, aggregating $284,612,000, are taken from and are the same as those in Table 1 annexed to the affidavit of Mr. Hill (R. vol. II, p. 1178), and are there entitled "Tables showing Transit Commission's Engineers' (unofficial) Valuation Estimates for Property as of June 30, 1926, arranged to Show Items of Property according to Provisions." The total figure given in the brief for the Transit Commission at page 191 is $287,550,474, or a difference of $2,938,474. This item we have been unable to identify; it does not appear in the record at page 1178.

[Parenthetically it may be said that the Commission's brief attributes a revenue of $24,622,761 to this rate base and apparently states that this produces a return of 11%. That is a manifest error in calculation, the sum being but 8.4%. $24,622,761 is the total revenue from all property in 1927 plus $2,000,000, being the amount assumed by the Commission as the cost of the strike.]

Revenues, Expenses and Application of Income for Year Ended June 30, 1926.

	Manhattan	Subway	System
Passengers Carried	346,204,374	784,280,073	1,130,484,647
Gross Operating Revenue	$19,065,165.61	$42,643,648.84	$61,708,814.45
Non-Operating Revenue	84,960.28	192,019.30	276,979.58
Total	$19,150,125.89	$42,835,668.14	$61,985,794.03
Operating Expenses and Other Costs of Plaintiff's Business	12,778,224.53	22,158,065.28	34,936,289.81
	$ 6,371,901.36	$20,677,602.86	$27,049,504.22
Taxes	2,435,504.86	915,278.01	3,350,782.87
Available for Charges on Company and City Property	$ 3,936,396.50	$19,762,324.85	$23,698,721.35
City Rental under Contracts Nos. 1 and 2	.....	2,655,186.26	2,655,186.26
Remainder Available for Charges	$ 3,936,396.50	$17,107,138.59	$21,043,535.09
Charges—Application of Amount Available			
Interest on Bonds (Rental)	$ 1,808,240.00	$	
Manhattan Dividend Rental	3,066,486.00	.....	
Interest on 5% Bonds	1,445,243.54	6,628,823.15	
Interest on 7% Notes	1,088,456.20	1,290,617.04	
Sinking Fund on 5% Bonds	631,949.12	1,821,804.16	
Interest on 6% Notes	21,899.99	504,999.37	
Interest on Equipment Trust Certificates	.....	291,321.84	
Total	$ 8,062,274.85	$10,537,565.56	18,599,840.41
Balance			$ 2,443,694.68

Note:—If the Company had not been able to retain the entire amount of the "remainder available for charges" because of the prior deficits in its preferential payments under Contract 3, it would only have been able to retain the Manhattan revenue of $3,936,396 and $14,203,630 of the income from the subway system or a total of $18,140,026, out of which it would have to meet its charges of $18,599,840. The City now claims that the deficits in the preferentials have been discharged.

The balance shown above was spent in meeting the Company's capital obligations for which no funds were available (R. vol. II, p. 1089).

Revenues, Expenses and Application of Income for Year Ended June 30, 1927.

	Manhattan	Subway	System
Passengers Carried	339,019,660	814,626,596	1,173,646,256
Gross Operating Revenue	$19,519,678.06	$43,796,409.84	$63,316,087.90
Non-Operating Revenue	75,434.10	181,741.62	257,175.72
Total	$19,595,112.16	$43,978,151.46	$63,573,263.62
Operating Expenses and Other Costs of Plaintiff's Business	13,997,102.02	23,446,577.26	37,443,679.28
	$ 5,598,010.14	$20,531,574.20	$26,129,584.34
Taxes	2,429,221.86	1,077,600.75	3,506,822.61
Available for Charges on Company and City Property	$ 3,168,788.28	$19,453,973.45	$22,622,761.73
City Rental under Contracts Nos. 1 and 2	.....	2,655,569.01	2,655,569.01
Remainder Available for Charges	$ 3,168,788.28	$16,798,404.44	$19,967,192.72
Charges—Application of Amount Available			
Interest on Bonds (Rental)	$ 1,808,340.00	$	
Manhattan Dividend Rental	3,086,756.00	.....	
Interest on 5% Bonds	1,457,159.47	6,640,807.15	
Interest on 7% Notes	1,093,362.93	1,280,222.33	
Sinking Fund on 5% Bonds	611,809.92	1,764,185.74	
Interest on 6% Notes	31,389.62	517,346.88	
Interest on Equipment Trust Certificates	.....	215,825.00	
Total	$ 8,077,917.94	$10,418,387.10	18,496,305.04
Balance			$ 1,470,887.68

Note.—If the Company had not been able to retain the entire amount of the "remainder available for charges" because of the prior deficits in its preferential payments under Contract 3, it would only have been able to retain the Manhattan revenue of $3,168,788 and $14,218,975 of income from the subway system or a total of $17,387,763, out of which it would have had to meet its charges of $18,496,305. The City now claims that the deficits in the preferentials have been discharged.

The balance shown above was spent in meeting the Company's capital obligations for which no funds were available (R. vol. II, p. 1089).